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SOME SPADEWORK ON THE IMPLIED WARRANTY OF AUTHORITY

ALBERT S. ABEL*

THERE is no doubt that one who purports to deal as agent for a named principal will be made to foot the bill, if his agency turns out to be mythical or if his authority is not broad enough to cover what he proposed to do. In undertaking one more discussion of the nature of the personal liability to which the agent of a disclosed principal or claimed principal subjects himself in the event no such agency or authority as is assumed really exists,¹ the writer may seem to be threshing old straw. But prior treatments, while often excellent as theoretical or descriptive exercises, have streamlined the case materials to the point of oversimplification and have largely neglected the practical consequences, if any, which are involved in settling the nature of the liability. Making no pretense to ambitious speculative re-examination of the various theories and propositions advanced, I propose here to catalogue the American decisions to find out on what basis the agent is held to answer in the several states, and, in a subsequent instalment to inquire whether it makes any difference what the nature of the liability is and, if so, what difference.

Alike in England and in the United States, the applicable doctrine suffered considerably from growing pains in its youth. In both, it has since settled into a relatively serene sedate maturity. To English lawyers, its eventual formulation is familiar as the doctrine of *Collen v. Wright*. That leading case,² decided in 1857, did indeed settle the law across the water. Intimations along similar lines had, however, been thrown out earlier by both English and American courts, so that the case is not entitled to the distinction of being the first recognition of the rule which has since come to prevail. Nevertheless it came at a time when a sufficient body of experience and discussion had accumulated in both countries to permit an understanding disposition of the problems involved. Hence it affords a convenient point of division from which

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¹ Cases of undisclosed principal, cases where the form or circumstances of the contract are such that it is deemed to be a contract of the agent personally with the third person to which the principal is not a party, cases involving public agents and those involving trustees, guardians, executors, and similar representatives present special issues and do not fall within the scope of this article.

² 8 E. & B. 647 (Ex. Ch. 1857).

to survey the earlier period of groping and the later one of development and refinement.

A. THE FORMATIVE PERIOD.

It seems an immutable law of nature, in matters judicial, that there be a New York rule and a Massachusetts rule. Those sturdy antagonists as usual headed the opposing ranks in the debate over what was to be done to the agent who exceeded the authority conferred on him by a disclosed principal. Around each in the traditional pattern there clustered a little knot of adherents; and the English courts bolstered Massachusetts from afar.

The fundamental issue was, When an agent undertakes to act for a known or disclosed principal, in entering into a contract or transaction, and it turns out that for one reason or another the requisite authority is lacking, shall he be made to answer to the other contracting party on the basis of treating him as a party to the contract or transaction in the place the principal would have occupied had authority been present or adequate, or shall his answerability be placed on other grounds instead?

The New York courts³ and their attendant retinue⁴ said, he is liable on and as a party to the contract. They reasoned that if a person undertakes to contract as agent, and so contracts as not legally to bind his principal, he is personally liable—that agents, if sued upon contracts, could exonerate themselves from personal liability only by showing authority to bind those for whom they had undertaken to act.⁵ To phrase it more crudely,

³ *Feeter v. Heath*, 11 Wend. 477 (N. Y. 1833); *Meech v. Smith*, 7 Wend. 315 (N. Y. 1831); *Dusenbury v. Ellis*, 3 Johns. Cas. 70 (N. Y. 1802); see *Palmer v. Stephens*, 1 Denio 471, 480 (N. Y. 1845); *Mott v. Hicks*, 1 Cow. 513, 536 (N. Y. 1823); cf. *White v. Skinner*, 13 Johns. 307, 310 (N. Y. 1816) (liability on sealed instruments).

⁴ *Lazarus v. Shearer*, 2 Ala. 718 (1841); *Deming v. Bullitt*, 1 Blackf. 241 (Ind. 1823); *Clay v. Oakley*, 5 Mart. N. S. 137 (La. 1826); *Brown v. Johnson*, 20 Miss. 398 (1849); *Byars v. Doore's Adm'r*, 20 Mo. 283 (1855); *Woodes v. Dennett*, 9 N. H. 55 (1837); *Bay v. Cook*, 22 N. J. L. 343 (1850); *Layng v. Stewart*, 1 W. & S. 222 (Pa. 1841); *Royce v. Allen*, 28 Vt. 234 (1856); accord *Gillaspie v. Wesson*, 7 Port. 454 (Ala. 1838); *Hampton v. Speckenagle*, 9 S. & R. 212 (Pa. 1822); see *Crawford v. Barkley*, 18 Ala. 270 (1850); *Savage v. Rix*, 9 N. H. 263, 268 (1838); *Underhill v. Gibson*, 2 N. H. 352, 356 (1821); *Jenkins v. Atkins*, 20 Tenn. 293, 299 (1839); *Roberts v. Button*, 14 Vt. 195, 202 (1842); *Hinsdale v. Partridge*, 14 Vt. 547 (1841); *Clark v. Foster*, 8 Vt. 98, 102 (1836); *Proctor v. Webber*, 1 D. Chipman 371, 378 (Vt. 1822); cf. *Harkins v. Edwards*, 1 Iowa 426, 431 (1855).

⁵ See *Lazarus v. Shearer*, 2 Ala. 718, 725 (1841); *Gillaspie v. Wesson*, 7 Port. 454, 461 (Ala. 1838); *Bay v. Cook*, 22 N. J. L. 343, 352 (1850); *Palmer v. Stephens*, 1 Denio 471, 480 (N. Y. 1845); *Mott v. Hicks*, 1 Cow. 513, 536 (N. Y. 1823); *Layng v. Stewart*, 1 W. & S. 222, 226 (Pa. 1841); *Proctor v. Webber*, 1 D. Chipman 371, 378 (Vt. 1822); cf. *Deming v. Bullitt*, 1 Blackf. 241, 243

their notion was, "Here is something that looks like a contract and that you, Mr. Agent, said was a contract; so far as you are concerned, therefore, it is a contract—somebody's contract; and, if it isn't the principal's, then it's yours". The South Carolina decisions⁶ took a somewhat original line, reading in the conduct of the agent a warranty of his authority to act for the principal in the premises and an agreement to indemnify third persons in the event it was lacking, and allowing recovery on the contract simply because that was one convenient method of asserting liability; they indicated concern with the merits and very little interest in the form of the claim.⁷

Sometimes the contractual character of the agent's liability was embedded in an actual holding, at other times not. In *Mott v. Hicks*,⁸ which may justly be styled a leading case in view of its influence as disclosed by extensive citation both in and beyond New York, the classical statement of the rule was purest dictum since the suit was actually one brought against the claimed principal and there was no serious contention that the agent lacked the requisite authority. There are plenty of other instances in which the nature of the agent's liability seems to have been in no way relevant to the decision—cases in which ample authority to contract in the manner and form employed was found,⁹ or in which the contract as written was construed as expressing only

(Ind. 1823); *White v. Skinner*, 13 Johns. 307, 311 (N. Y. 1816); *Stone v. Wood*, 7 Cow. 453, 455 (N. Y. 1827); *Rossiter v. Rossiter*, 8 Wend. 494, 499 (N. Y. 1832). But cf. *Walker v. State Bank of New York*, 9 N. Y. 583 (1854).

⁶ *Bank of Hamburg v. Wray*, 4 Strobh. L. 87 (S. C. 1849); *Edings v. Brown*, 1 Rich. L. 255 (S. C. 1845).

⁷ "Whenever one undertakes to make a contract in the name of another, his signature should be held as a guaranty that he has authority to bind the principal. It is only just that one who pretends to give a security to another, by assuming to contract in the name of a person whom he has no authority to bind, should supply, out of his own means, the security which he fails to impose on his principal. The undertaking to bind another without authority to do so, imports fraud or culpable negligence, and should fix on the guilty party responsibility for the injury that may result from his act. All the authorities agree that the measure of damages must be the injury sustained, whether the action be in tort or on the contract, and the conflict of authorities is resolved into a question of the form of the action. An action on the instrument affords the most direct and just measure of compensation. If the contract be for the payment of money, in either form of action, the damages must be the sum stipulated; and if the contract be for the performance of any other act, compensation for the breach or neglect of the duty may be as fairly decided in the one form as the other", *Edings v. Brown*, 1 Rich. L. 255, 257 (S. C. 1845).

⁸ 1 Cow. 513 (N. Y. 1823).

⁹ Cf. *Pitman v. Kintner*, 5 Blackf. 250 (Ind. 1839); *Roberts v. Button*, 14 Vt. 195 (1842); *Proctor v. Webber*, 1 D. Chipman 371 (Vt. 1822).

his personal obligation,¹⁰ or where the action was against a principal who received the benefits of the bargain,¹¹ or where no objection was made to the form of the action against the agent.¹²

On the other hand, there were certainly cases whose result depended on the analysis of the agent's liability—cases where authority was asserted or admitted to be lacking or deficient and where suit was brought against the agent, who was held liable in an action on negotiable paper,¹³ or an action of debt¹⁴ or covenant¹⁵ or assumpsit,¹⁶ or against whose action in assumpsit a set-off was allowed.¹⁷ The firm and deliberate rejection of the proposition that the agent's liability was one which should be enforced in a special action on the case¹⁸ made it clear that some courts were not merely concerned with sticking the agent but were sincerely convinced that the latter's obligation was contractual in character and to be enforced by the methods peculiarly appropriate to contract liability. Others, however, were not such sticklers for exclusive

¹⁰ *Cf. Savage v. Rix*, 9 N. H. 262 (1838); *Hinsdale v. Partridge*, 14 Vt. 547 (1841).

¹¹ *Cf. Crawford v. Barkley*, 18 Ala. 270 (1850).

¹² *Cf. Underhill v. Gibson*, 2 N. H. 352 (1821).

¹³ *Lazarus v. Shearer*, 2 Ala. 718 (1841); *Coffman v. Harrison*, 24 Mo. 524 (1857); *Rossiter v. Rossiter*, 8 Wend. 494 (N. Y. 1832); *Dusenbury v. Ellis*, 3 Johns. Cas. 70 (N. Y. 1802); *Bank of Hamburg v. Wray*, 4 Strobb. L. 87 (S. C. 1849); *cf. Gillaspie v. Wesson*, 7 Port. 454 (Ala. 1838) (public agent); *Byars v. Doore's Adm'r*, 20 Mo. 283 (1855) (contest over note filed as claim in probate proceedings).

¹⁴ *Clay v. Oakley*, 5 Mart. N. S. 137 (La. 1826) (endorsement); *Palmer v. Stephens*, 1 Denio 471 (N. Y. 1845).

¹⁵ *Edings v. Brown*, 1 Rich. L. 255 (S. C. 1845).

¹⁶ *Woodes v. Dennett*, 9 N. H. 55 (1837) (book account); *Bay v. Cook*, 22 N. J. L. 343 (1850) (same); *Feeter v. Heath*, 11 Wend. 477 (N. Y. 1833); *Layng v. Stewart*, 1 W. & S. 222 (Pa. 1841); *Hampton v. Speckenagle*, 9 S. & R. 212 (Pa. 1822); *cf. Royce v. Allen*, 28 Vt. 234 (1856) (alternative holding in sustaining action on book account, the principal being undisclosed, which afforded the other independent ground of decision).

¹⁷ *Meech v. Smith*, 7 Wend. 315 (N. Y. 1831).

¹⁸ *Meech v. Smith*, 7 Wend. 315, 319 (N. Y. 1831) ("It is contended that if liable, the plaintiff must be charged in an action on the case; such an action, I apprehend, could not be sustained. There has been no *tort* committed; the transaction between these parties was a *contract*, and that contract being valid in law, must be obligatory on some one, either the principal or the agent, and the agent having made it without authority from his principals, they were not bound; it follows that the agent himself is bound"); *accord Lazarus v. Shearer*, 2 Ala. 718, 726 (1841). Compare *Clark v. Foster*, 8 Vt. 98 (1836) (allowing recovery in action on the case for deceit, the court saying that fraud must be shown but that assuming to act without authority is "morally as well as legally fraudulent and casts on the agent the burden to establish his innocence" with *Roberts v. Button*, 14 Vt. 195, 202 (1842) (stating it as "the better opinion" that proceedings against agents for undue exercise of authority should be by action on the contract instead of a special action on the case and explaining *Clark v. Foster*, *supra*, as a decision "in regard to contracts under seal . . . upon the ground of a virtual fraud").

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reliance on the contract, and were willing to concede that if the agent's name did not appear anywhere in the writing executed¹⁹ or if for some other reason an action on the contract would be an ineffectual remedy while the elements requisite for some other form of action could be spelled out independently without too much juggling,²⁰ the third person might assert his claim against the agent in some other manner. Still others seem to have regarded the choice between case and the contract actions as a matter of convenience rather than of principle and to have been correspondingly willing to entertain the suit without quibbling over the remedy.²¹

A second major group of authorities was emphatic that the agent's liability, substantial though it might be, was not contractual. Perhaps those holdings represented departures from an earlier view in the same jurisdiction but they were unambiguous. In Massachusetts, for instance, the pioneer cases contain language which smacks of the contract theory of liability,²² but the court soon veered away from that approach,²³ the tendency was confirmed in a forceful opinion by Chief Justice Parker,²⁴ and that

¹⁹ See *Byars v. Doore's Adm'r*, 20 Mo. 283, 285 (1855).

²⁰ Cf. *Clark v. Foster*, 8 Vt. 98 (1836) (unauthorized act was execution of mortgage on principal's land, and third person was allowed to recover in action for deceit).

²¹ See *Woodes v. Dennett*, 9 N. H. 55, 58 (1837); *Edings v. Brown*, 1 Rich. L. 255, 258 (S. C. 1845).

²² See *Hatch v. Smith*, 5 Mass. 42, 52 (1809); *Lewis v. Friend*, 1 Dane Abr. 217 (1790).

²³ See *Long v. Colburn*, 11 Mass. 97, 98 (1814).

²⁴ *Ballou v. Talbot*, 16 Mass. 460 (1820) ("The question in this case is not whether the defendant is liable for having undertaken to make the promise for Perry, but whether the note declared on is the note of the defendant. It is obvious, from the signature, that it was neither given nor received as the defendant's note. It is found by the jury, that he had no authority to sign it for Perry, but the legal inference from this fact is, not that it became his promise directly, but that he is answerable in damages for acting without authority. What is stated in the case of *Long v. Colburn*, as an intimation of the Court, was undoubtedly a settled opinion, viz., that, in such case, a special action upon the case would be the proper action. One way, and perhaps the best way, to ascertain whether a party is sued in the right form of action, is to see of what fact the declaration gives him notice, and whether that constitutes substantially the contract to which he is called to answer. In the case before us, the defendant is charged with having made a promissory note to the plaintiff. The evidence produced is apparently the note of another. But he wrongfully made this note for the other. This is entirely new ground, of which the declaration gave him no notice, and which he cannot be expected to be prepared to answer. Besides, if the note is to be considered as evidence of the defendant's own promise, he must pay according to the tenor of it; whereas, if he were sued for falsely assuming an authority, he might defend himself by showing that the person, for whom he assumed to act, had afterwards ratified his act, or that he had otherwise satisfied the debt for which the note was given, or, perhaps, he might show that no debt was due for which the note was given, or that he had authority to make it. It is, in short, a proper subject for a special action, in which damages will be recovered according to the injury sustained").

state remained thenceforth steadfast to the creed that the agent's liabilities were not those of a party to the contract or transaction.²⁵ So, in England, there are intimations that the original practise had been to regard the agent as liable on the contract;²⁶ but before long signs of dissatisfaction with that analysis began to crop out²⁷ and its definite rejection followed shortly.²⁸ A similar transition away from an original adoption of the contract view occurred in other jurisdictions²⁹ while still others, many of which entered the fray at a later date with a body of case law to guide them, eschewed the substituted-party-to-the-contract approach.³⁰

It must not be thought, of course, that all of these opinions represented square holdings any more than did all those on the other side. In some of them, the contract was construed as an authorized contract binding the principal.³¹ In some, the defendants were public officials and as such subject to special rules.³²

A good number of them were, however, exactly in point—

²⁵ *Jefts v. York*, 64 Mass. 392 (1852), 58 Mass. 371 (1849); *Salem Mill Dam Corp. v. Ropes*, 26 Mass. 187 (1830).

²⁶ See *Collen v. Wright*, 3 E. & B. 647, 660 (Ex. Ch. 1857) (*per Cockburn*, C. J., dissenting); *Thomas v. Hewes*, 2 Cr. & M. 519, 530 note (Ex. 1934) referring to *Kennedy v. Gouveia* (Lancaster Assizes, 1823, unreported); *cf. Wilson v. Barthrop*, 2 M. & W. 864 (Ex. 1837) (plaintiff must in any event show agent's lack of authority before he can proceed against him on bill drawn by him for principal). A dictum in *Anonymous*, Holt K. B. 309 (1699), "If A. employs B. to work for C. without warrant from C. A. is liable to pay for it", the earliest remotely relevant reference to the problem discovered, appears to lean somewhat toward liability on the contract.

²⁷ See *Smout v. Ilbery*, 10 M. & W. 1, 11 (Ex. 1842); *accord Polhill v. Walter*, 3 B. & Ad. 114, 122 (K. B. 1832).

²⁸ *Lewis v. Nicholson*, 18 Q. B. 503 (1852); *Jenkins v. Hutchinson*, 13 Q. B. 744 (1849); see *Randell v. Trimen*, 18 C. B. 786, 794 (1856).

²⁹ Compare *Potts v. Henderson*, 2 Ind. 327, 328 (1850) and *McHenry v. Duffield*, 7 Blackf. 41 (Ind. 1843) with *Deming v. Bullitt*, 1 Blackf. 241 (Ind. 1823) and *McClure v. Bennett*, *id.* 189 (1822); and compare *Moor v. Wilson*, 26 N. H. 332 (1853) with *Savage v. Rix*, 9 N. H. 263 (1838); *Woods v. Dennett*, 9 N. H. 55 (1837), and *Underhill v. Gibson*, 2 N. H. 352 (1821). In both states, however, there has been a subsequent return to the contract theory, see *infra* note 74. In New Jersey, the normal evolution seems to have been reversed, with the court apparently holding in the early fragmentary opinion of *Tuttle v. Ayres' Exec'rs*, 3 N. J. L. 682 (1810), that the agent could not be held on the contract, and later allowing such liability, *cf. Bay v. Cook*, 22 N. J. L. 343 (1850); neither court nor counsel in the later case cited the earlier one and counsel for the agent seems from the brief abstract of his argument to have conceded that, if his client were to be deemed a private agent, he was answerable on the contract, *id.* at 347.

³⁰ *Ogden v. Raymond*, 21 Conn. 379 (1853); *Johnson v. Smith*, 21 Conn. 627 (1852); *Stetson v. Patten*, 2 Me. 358 (1823); *Delius v. Cawthorn*, 13 N. C. 90 (1829); *Potts v. Lazarus*, 4 N. C. 180 (1815); *accord Harper v. Little*, 2 Me. 14 (1822); *cf. Sayre v. Nichols*, 7 Cal. 535 (1857).

³¹ *Cf. Johnson v. Smith*, 21 Conn. 627 (1852); *Long v. Colburn*, 11 Mass. 97 (1814); *Tuttle v. Ayres' Exec'rs*, 3 N. J. L. 682 (1810).

³² *Cf. Hite v. Goodman*, 21 N. C. 364 (1836).

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cases where, although the agent's authority was claimed, found, or conceded to have been inadequate to enter into the transaction attempted in behalf of the identified principal, he was nevertheless held not liable to the person who had dealt with him in actions on commercial paper³³ or actions of covenant³⁴ or assumpsit³⁵ or debt;³⁶ or where the existence of a contractual obligation was a condition precedent to the liability of third persons.³⁷ Also one must not overlook recoveries sustained against over-assuming agents in actions on the case for fraud.³⁸ Although somewhat less conclusive against the contract theory than the authorities denying recovery in contract actions, since conceivably agents might have been liable alternatively as parties to the contract and on some other basis, certainly they were directly opposed to the opinions³⁹ which insisted that liability was peculiarly and exclusively a matter of obligation under the contract and scouted the notion of asserting it in actions on the case.

This implied negation of the premise that the attempted undertaking necessarily resulted in a contract — if not in behalf of the principal, then one to which the agent was a party. The courts did not shrink from the consequence but, when the argument was put to them, they emphatically repudiated it.⁴⁰ To allow the argument, it was suggested, would be for the court to arrogate to it-

³³ Cf. *Sayre v. Nichols*, 7 Cal. 535 (1857); *Ballou v. Talbot*, 16 Mass. 460 (1820).

³⁴ Cf. *Abbey v. Chase*, 60 Mass. 54 (1850); *Potts v. Lazarus*, 4 N. C. 180 (1815).

³⁵ Cf. *Ogden v. Raymond*, 21 Conn. 379 (1853); *Jefts v. York*, 58 Mass. 371 (1849); *Lewis v. Nicholson*, 18 Q. B. 503 (1852); *Jenkins v. Hutchinson*, 13 Q. B. 744 (1849).

³⁶ Cf. *McHenry v. Duffield*, 7 Blackf. 41 (Ind. 1843); *Delius v. Cawthorn*, 13 N. C. 90 (1829); *Smout v. Ilbery*, 10 M. & W. 1 (Ex. 1842); *accord Tuttle v. Ayres' Exec'rs*, 3 N. J. L. 682 (1810).

³⁷ Cf. *Stetson v. Patten*, 2 Me. 358 (1823) (needed to make out requisite mutuality of obligation); *Salem Mill Dam Corp. v. Ropes*, 26 Mass. 187 (1830) (stock subscription contracts dependent upon existence of binding agreements for stipulated number of shares).

³⁸ *E.g.*, *Randell v. Trimen*, 18 C. B. 786 (1856).

³⁹ *Supra* note 18.

⁴⁰ *Taylor v. Shelton*, 30 Conn. 122 (1861); *Jefts v. York*, 64 Mass. 392 (1852); *Abbey v. Chase*, 60 Mass. 54 (1850); *Ballou v. Talbot*, 16 Mass. 460 (1820); *Delius v. Cawthorn*, 13 N. C. 90 (1829); *Potts v. Lazarus*, 4 N. C. 180 (1815); *Lewis v. Nicholson*, 18 Q. B. 503 (1852); *Smout v. Ilbery*, 10 M. & W. 1 (Ex. 1842); see *Hite v. Goodman*, 21 N. C. 364 (1836); *accord Ogden v. Raymond*, 21 Conn. 379 (1853); *Stetson v. Patten*, 2 Me. 358 (1823) *semble*; but see *Donahoe v. Emery*, 50 Mass. 63, 66 (1845) (where, however, the representatives' liability was asserted by counsel and seems to have been sustained by the court on the ground that they undertook to bind only themselves by the instrument sued on, considering the form it took); *Jones v. Downman*, 4 Q. B. 235 note, 239 (1842) (same).

self the power of making contracts for the parties, and moreover might flout the spirit of the parol evidence rule where the contract was in writing.⁴¹

If, however, the agent was not to be deemed a party to the contract or transaction undertaken in excess of his authority or in the absence of authority, and was still to be held answerable to the third person with whom he had dealt, it was up to the courts to isolate and identify some other theory on which he might be held. The appropriate remedy, it was said, was by a suit in the nature of a special action on the case;⁴² the ground of the agent's liability his falsely assuming the exercise of an authority which he did not possess.⁴³ This was helpful, but within limits; for, by hypothesis, the implied assertion of an authority not possessed might be deemed to amount to a fraud on the one hand or a warranty on the other. Judicial unfamiliarity with the relatively new-fangled doctrine of implied warranties⁴⁴ probably explains much of the early failure to appreciate the latent difficulties or to specify whether deceit or warranty was the underlying ground of liability. That the remedy was a special action on the case told nothing. That was the appropriate means to hold one accountable either for fraud or on an implied warranty—indeed had even been the appropriate way of asserting contract liability until the comparatively late birth of *assumpsit* in the family of actions not so very long before.

⁴¹ *Harper v. Little*, 2 Me. 14, 19 (1822) ("In what part of the deed does Harper undertake to grant or covenant for himself? Can the court grant or covenant for him? or subject him to the consequences of having so granted or covenanted, when an inspection of the deed at once negatives these questions? No man can aver against a deed, or explain or contradict it. And can a court, in construing a deed, proceed on a different principle?"). Similar language appears in *Delius v. Cawthorn*, 13 N. C. 90 (1829) and *Lewis v. Nicholson*, 18 Q. B. 503 (1852).

⁴² See *McHenry v. Duffield*, 7 Blackf. 41, 42 (Ind. 1843); *Stetson v. Patten*, 2 Me. 358 note (1823); *Harper v. Little*, 2 Me. 14, 20 (1822); *Jefts v. York*, 64 Mass. 392 (1852); *Salem Mill Dam Corp. v. Ropes*, 26 Mass. 187, 196 (1830); *Ballou v. Talbot*, 16 Mass. 461, 463 (1820); *Long v. Colburn*, 11 Mass. 97, 98 (1814); *Tuttle v. Ayres' Exec'rs*, 3 N. J. L. 682 (1810); *Delius v. Cawthorn*, 13 N. C. 90, 99 (1829).

⁴³ See *Johnson v. Smith*, 21 Conn. 627, 634 (1852); *McHenry v. Duffield*, 7 Blackf. 41, 42 (Ind. 1843); *Harper v. Little*, 2 Me. 14, 21 (1822); *Salem Mill Dam Corp. v. Ropes*, 26 Mass. 187, 196 (1830); *Ballou v. Talbot*, 16 Mass. 461, 463 (1820); *Delius v. Cawthorn*, 13 N. C. 90, 99 (1829); *Jenkins v. Hutchinson*, 13 Q. B. 744, 752 (1849); *Smout v. Ilbery*, 10 M. & W. 1, 9 (Ex. 1842); *Polhill v. Walter*, 3 B. & Ad. 114, 123 (K. B. 1832).

⁴⁴ Even in the law of sales, the doctrine of implied warranties was a late growth, with implied warranties of quality not appearing until the beginning of the nineteenth century, the first distinct formulation of the law on the subject appearing as late as 1815, see WILLISTON, *SALES* (1st ed. 1909) § 228.

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The jurisdictions which had united in holding that agent's liability for exercise of unpossessed authority was not contractual were not so sure whether it sounded in fraud and deceit or in warranty. The pattern of development on the former issue was repeated as to the latter. Just as the first impulse even of those who later rejected the contract analysis had been to seize on the relatively familiar contractual obligation as a solution,⁴⁵ so, when further characterization became necessary, the initial response was to resort to the comparatively well understood tort of deceit and to speak in terms of fraud, false representations, or the like⁴⁷ in describing how or why the agent was liable. By and by, while the downright misrepresentation of authority was still labelled fraud, suggestions began to creep in that honestly but mistakenly acting as agent in the exercise of powers unpossessed, with its tacit representation of the adequacy of the authority, was in the nature of a false warranty and that the agent was liable on that score.⁴⁷ Beyond this American courts did not advance, contenting themselves with the remark that in both cases liability was grounded on deceit and the remedy an action in tort.⁴⁸ Contemporaneously the view was being expressed in England that a distinction was to be made, an action for deceit being appropriate in cases of known intentional misrepresentation and an action on the implied contract where the elements of deliberate deceit were absent.⁴⁹ Meanwhile the warranty notion was receiving its most unequivocal expression in the United States in a decision emanating from a state which did not insist on the misrepresentation, special-action-on-the-case concept at all, but rested liability on the notion of indemnity and tolerantly sanctioned its assertion in contractual actions.⁵⁰

All courts, of whatever shade of opinion, were willing to make some concessions. Those which rejected the contract theory nevertheless agreed that if the agent by the terms of the contract bound himself as a primary party to the agreement either instead of or

⁴⁵ *Supra* notes 22, 26, 29.

⁴⁶ *Randell v. Trimen*, 18 C. B. 786 (1856); see *Ogden v. Raymond*, 22 Conn. 379, 385 (1853); *Abbey v. Chase*, 60 Mass. 54, 57 (1850); *Jefts v. York*, 58 Mass. 371, 372 (1849); *Smout v. Ilbery*, 10 M. & W. 1, 11 (Ex. 1842); *Johnson v. Ogilby*, 3 P. Wms. 278, 279 (Ch. 1734) *semble*; cf. *Sayre v. Nichols*, 7 Cal. 535, 542 (1857).

⁴⁷ See *Sayre v. Nichols*, 7 Cal. 535, 538 (1857) *semble*; *Jefts v. York*, 64 Mass. 392, 395 (1852); *Lewis v. Nicholson*, 18 Q. B. 503, 513, 515 (1852); *Jenkins v. Hutchinson*, 13 Q. B. 744, 750 (1849) (argument of counsel).

⁴⁸ See *Jefts v. York*, 64 Mass. 392, 395 (1852).

⁴⁹ See *Lewis v. Nicholson*, 18 Q. B. 503, 513, 515 (1852).

⁵⁰ Cf. *Edings v. Brown*, 1 Rich. L. 255 (S. C. 1845).

in addition to his disclosed principal, he would be held to his bargain and must answer in an action on the contract.⁵¹ So, there was general concurrence in the view that if the agent deliberately made known false representations intended to deceive as to his authority, by way of inducing action, he might be liable in an action for fraud and deceit.⁵²

Whether the judges were minded to treat the agent's liability as resting on the primary contract or on a warranty or on fraud and deceit, the judicial task in any case was to supply a missing element. If, in this three-horned dilemma, they chose to rest liability on the contract itself, they could do so only by straining and stretching the ordinary rules of construction, by disregarding and misconstruing the principles on which it was ordinarily determined whether the agreement expressed was that of principal or agent. Indeed, the usual rationale of the contract theory seems to trace to an unconscious and logically unjustified shift from the proposition that the undertaking must in form express an agreement with the principal or an agreement with the agent to the proposition that it must in substance embody an obligation of the principal or an obligation of the agent. What was at best a device for interpretation was thus erected into a principle as to liability. Shrewder judges, aware of the lurking fallacy, refused to be beguiled by this spurious identification, manifesting instead a lively appreciation of the distinction between the questions (1) whether the obligation expressed by the writing was that of the principal or that of the agent, (2) whether, granted that it was in form the principal's undertaking, the agent was chargeable on some other score for want of adequate authority.⁵³

⁵¹ See, e.g., *Johnson v. Smith*, 21 Conn. 627, 634 (1852); *Delius v. Cawthorn*, 13 N. C. 90, 100 (1829); *Jones v. Downman*, 4 Q. B. 235 note, 239 (1842).

⁵² Cf. *Clark v. Foster*, 8 Vt. 98 (1836) (also erecting presumption of actual fraud from the fact of assumption of unpossessed authority); *Smout v. Ilbery*, 10 M. & W. 1 (Ex. 1842).

⁵³ The distinction is clearly stated in *Ogden v. Raymond*, 21 Conn. 379, 385 (1853) ("We are aware, that it is not infrequently laid down, as a rule of law, that, if an agent does not bind his principal, he binds himself; but this rule needs qualification, and cannot be said to be universally true or correct . . . If the form of the contract is such, that the agent personally covenants, and then adds his representative character, which he does not, in truth sustain, his covenant remains personal and in force, and binds him, as an individual; but, if the form of the contract is otherwise, and the language, when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable; for it is not *his* contract, and the law will not force it upon him. He may be liable, it is true, for tortious conduct, if he has knowingly or carelessly assumed to bind another, without authority; or, when making the contract, has concealed the true state of his authority, and falsely led others to repose in his authority; but, as we have said, he is not, of course, liable on the

If, however, the court relied on either the warranty or the fraud analysis, that necessitated the implication of a representation as to authority. But, if warranty were the ground chosen, the court must further infer from the implied representation a collateral undertaking that the authority assumed in fact existed; whereas, if it elected to treat the matter as a fraud, in the then prevalent notions as to that tort, the court must imply whatever in the way of conscious falsehood and deliberate deception was understood to be necessary to satisfy the local requirements for an action of deceit. Today the choice might strike most lawyers as not especially difficult; but that was not necessarily so in an age not yet schooled by a long record of flexible use of implied warranties to the practice of having the mind see two contracts where the eye reads only one. Acceptance of the warranty theory made it easy to dismiss the issues of scienter and wilful misrepresentation as having little if any bearing on the matter of agent's liability.⁵⁴ Without it, the courts struggled painfully to work out an artificial and unsatisfactory sort of constructive scienter to satisfy the requisites of an action for deceit.⁵⁵

There was the usual contingent of eminent fence-sitters, who cautiously refused to commit themselves as to the basis on which the liability rested, while fully recognizing that somehow or another the agent was answerable for an assumption of unpossessed author-

contract itself, nor, in any form of action whatever. The question in these cases, will be found to be one of construction of the language and meaning of the person who attempts to act for another, and is often a question attended with very great difficulty and doubt; but when the intention is ascertained, that intention should ever be the rule for determining whose contract it is"). To the same effect, see *Hewitt v. Wheeler*, 21 Conn. 557, 561 (1853); *Jefts v. York*, 58 Mass. 371, 372 (1849); *Delius v. Cawthorn*, 13 N. C. 90, 99 (1829); *Lewis v. Nicholson*, 18 Q. B. 503, 511 (1852). Evident misapprehension of the issues is found here too, however; witness the frequent citation in support of the non-contract theory of *Hopkins v. Mehaffy*, 11 S. & R. 126 (Pa. 1824), a case where the agent's authority to agree on the substantive terms of the contract was undisputed and where it does not even appear but that he was authorized to contract under seal, the only question being whether, when the only covenants expressed in the instrument were those of the principal, while the seal and signature was that of the agent in its behalf, the agent could be sued on the covenants; held no; the case certainly says nothing to the point as to unauthorized acts and while it does perhaps indicate that absence of principal's obligation does not make the instrument that of the agent, strong hints are thrown out that the principal would be liable in assumpsit even though not in covenant.

⁵⁴ See *Jefts v. York*, 64 Mass. 392, 395 (1852); *Bank of Hamburg v. Wray*, 4 Strobh. L. 87, 90-91 (S. C. 1849); *Edings v. Brown*, 1 Rich. L. 255, 257 (S. C. 1845); accord *Lewis v. Nicholson*, 18 Q. B. 503, 513 (1852).

⁵⁵ Cf. *Ogden v. Raymond*, 22 Conn. 279, 285 (1853) (non-contract state); *Clark v. Foster*, 8 Vt. 98 (1836) (contract state, but contract liability unavailing in the particular case).

ity. Kent⁵⁶ and Story,⁵⁷ the most considerable of the contemporary treatise writers who touched on the question,⁵⁸ were distinctly indistinct in their explanations. The latter in particular was the transcendent authority of his time in the field of agency law, and his enigmatic handling of the problem had the somewhat amusing consequence that courts and attorneys freely cited his Delphic utterance to support the most opposed and various positions. This masterly indecision was imitated by the Maryland court, which contented itself with ruling that a party purporting to act as agent would be "'personally responsible" to third persons with whom he dealt, if he did not possess any authority therefor from the principal, or if he exceeded his powers,⁵⁹ with no elaboration of the nature of that personal liability. Courts are not situated quite so happily for equivocation as are textwriters, however, since, if their remarks are more than mere dicta, they must give them body and content by the way they dispose of the cases in which the loose language is used. So here, the court, by allowing recovery against the agent in an action based on the contract, placed on its language the practical interpretation of an adherence to the contract theory of liability.⁶⁰

⁵⁶ See 2 KENT, COMMENTARIES (1827) 492-494 (indiscriminately blending language of alternative liability and of liability in a special action on the case, with no indication of a preference or even of awareness of difference in the authorities).

⁵⁷ STORY, COMMENTARIES ON THE LAW OF AGENCY (6th ed. 1863) §§ 264, 264a. The authorities are well summarized in the footnotes, and certain of the more obvious propositions, such as liability for fraud in the event of conscious deliberate misstatement and non-liability on a writing in the event the agent's name nowhere appears thereon, are stated positively enough. On the central issue, the eminent author contents himself with the remark, "But although an agent, who undertakes to act for a principal without authority, or exceeds his authority, is responsible . . . to the other contracting party therefor; yet it may sometimes, under such circumstances, become a nice question, in cases of contracts made by him as agent, and in the name of his principal, in what manner the remedy is to be sought against him, whether by an action *ex directo* upon the contract itself, or by a special action on the case, for the wrong done thereby to the other contracting party", and the conclusion, "Upon this point the authorities do not seem to be entirely agreed".

⁵⁸ An English treatise, PALEY, PRINCIPAL AND AGENT, not presently available to the writer, seems, however, to have maintained the contract theory in discussing the problem at p. 386 (3d ed. 1833), if one may rely on the language used in judicial references to it; see, *e.g.*, Cockburn, C. J. dissenting, in *Collen v. Wright*, 8 E. & B. 647, 660 (Ex. Ch. 1857).

⁵⁹ See *Keener v. Harrod*, 2 Md. 63, 70 (1852).

⁶⁰ *Cf. Keener v. Harrod*, 2 Md. 63 (1852) (sustaining an action against an agent for a commission, agreed to be paid for supplying the name of a purchaser, such agreement being outside the agent's authority).

B. THE PRESENT STATE OF THE LAW.

Collen v. Wright presented a situation where a leasing agent had let his principal's premises by a lease apparently proper in all respects except that it was for a twelve and a half year term, which was longer than his authority permitted him to grant. The principal duly notified the lessee of the departure from the agent's authority, and the latter in turn notified the agent of the dispute, further informing him of his having instituted a bill for specific performance against the principal and of his intention, if unsuccessful, to hold the agent for his costs. The agent replied that he would resist any attempt to hold him liable. Specific performance having been denied, on the ground of the agent's want of authority to give a lease for so extended a term, and the agent having meanwhile died, the lessee brought an action against the representatives of the agent's estate to recover damages. Three items of damage were involved: (1) the loss of the contract, (2) certain outlays and expenditures on the premises made by the lessee in reliance on the lease, (3) the costs and expenses of the unsuccessful specific performance suit against the principal. At the suggestion of the court, the first was abandoned by the plaintiff, and the second admitted by defendant on the assumption of liability.⁶¹ The dispute centered mostly about the third. There was nothing to show but that the agent in good faith, although erroneously, had believed himself to have power to make such a lease as he in fact executed. There was the further complication that the agent had died before suit was instituted, with the consequence that, if this were a tort action, under prevailing rules, the cause of action might be deemed to have perished with him and not to survive against his estate. On a case stated, the lower court allowed a recovery to the extent of the costs of the equity suit and the outlays on the premises,⁶² Lord Campbell, C. J., clearly stating⁶³ that liability was grounded on a warranty, and Wightman and Crompton, J. J., apparently acquiescing in this analysis without stating it quite so explicitly, although the latter did plainly declare that liability was not, and in the circumstances could not be, rested on the theory of fraud and deceit.⁶⁴ On appeal, both the disposition of the case and the theory on which it had been rested were sustained.⁶⁵ The brief discussion

⁶¹ 7 E. & B. 301, 311 (K. B. 1857).

⁶² 7 E. & B. 301 (K. B. 1857).

⁶³ *Id.* at 312.

⁶⁴ *Id.* at 314.

⁶⁵ 8 E. & B. 647 (Ex. Ch. 1857).

of Willes, J.,⁶⁶ is a classic statement of the relevant law. Cockburn, C. J., in a forceful dissent,⁶⁷ urged that the decision amounted to judicial legislation and that the notion of an implied warranty of authority was wholly novel and unknown to the common law of England. Probably his contention had merit, in view of the failure of the majority opinion to cite a single authority to sustain the proposition it advanced; but in any event, it was not sufficiently cogent to carry a single one of his colleagues with him in dissent.

The case as it shaped up necessitated an election between the various theories and an election was duly made in favor of the notion of implied warranty, which certainly constituted a square holding. Its doctrine has since been uniformly adhered to as the law of England, the whole course of subsequent decision there being merely to develop the applications and refine the consequences of the implied-warranty approach to agent's liability, with no indications of any inclination to depart from it.⁶⁸

The impression is a prevalent one that the law is settled in the United States in full harmony with the doctrine announced in *Collen v. Wright* and applied in later cases from England and the British commonwealth of nations. Indeed, the manner in which the rules are expressed by twentieth-century legal writers in this country substantially summarizes those cases. Thus the sages of the American Law Institute black-letterize the law as follows:

⁶⁶ *Id.* at 657 ("I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he had induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise").

⁶⁷ *Id.* at 658-664.

⁶⁸ For a discussion of the present state of the authorities in England, see 1 HALSBURY, LAWS OF ENGLAND (1907) 221. The cases are collected in 1 ENGLISH AND EMPIRE DIG. (1919) 657-667 and ENGLISH AND EMPIRE DIG. SUPP. (1941) at 109-111. Radcliffe, *Some Recent Developments of the Doctrine of Collen v. Wright* (1902) 18 L. Q. REV. 364, and Hoyles, *Implied Warranty of Authority by Agent* (1911) 47 CAN. L. J. 676, may be consulted for a critical analysis and summary of the authorities.

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"Except as stated in § 332 (dealing with partially incompetent principals), a person who purports to make a contract, conveyance, or representation on behalf of a principal whom he has no power to bind thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized."⁶⁹

"A person who tortiously misrepresents to another that he has authority to make a contract, conveyance, or representation on behalf of a principal whom he has no authority to bind thereby becomes subject to liability to the other in an action of tort for loss caused by reliance upon such misrepresentation."⁷⁰

Here we have a commitment to the rule that the normal basis of agent's liability in such cases is for breach of implied warranty of authority, supplemented by the possibility of a tort action for deceit in the event the requisite elements for such an action concurrently exist in the circumstances developed. The more popular legal encyclopedias, while noting the presence of jurisdictional variations, speak to like effect.⁷¹ And Mechem, in his great treatise, gives in his vote for that same principle,⁷² that the essence of the situation is the implied warranty.

From such a happy unison, only a brash soul would dare dissent. It is no heresy, however, to remember that even general rules of law accepted by all legal scholars are seldom received quite so whole heartedly as among the several states of the union. Some courts will have none of it. Others not quite so individualistic yield only an equivocal and qualified adherence to the general rule stated. If for no other reason, then as a corrective of over-simplification, knowledge of what the American law is may be usefully followed up by some inquiry into what the American courts hold.

The contract rationale is not yet wholly extinct. Some of the states which had accepted it in the earlier period have clung to it faithfully,⁷³ recognizing often that the modern tendency has been

⁶⁹ RESTATEMENT, AGENCY (1933) § 329.

⁷⁰ *Id.* § 330.

⁷¹ 2 AM. JUR. 250-254 (1936); 3 C. J. S. 114-117 (1936).

⁷² Thus, he characterizes as "the true principle" the proposition that "the liability of the agent is based on his untrue representation of warranty, however innocent, of a material fact, namely, the fact of his authorization", 1 MECHEM, AGENCY (2d ed. 1914) 1007. His discussion of the principles involved, *id.* §§ 1362-1372 is luminous and acute and will repay reading in its entirety as a critical approach to the various doctrines.

⁷³ *Barnes v. Ball*, 209 Ala. 618, 95 So. 812 (1923); *Lutz v. Van Heynigen Brokerage Co.*, 199 Ala. 620, 75 So. 284 (1917); *Belisle v. Clark*, 49 Ala. 98 (1873); *Coral Gables, Inc. v. Palmetto Brick Co.* 183 S. C. 478, 191 S. E. 337

to discard it in favor of the warranty and/or misrepresentation approach, but maintaining their ancient allegiance in deference to the principles of *stare decisis*. In others of them, the present status of the law is less clear, either because the venerable age of the last judicial utterance on the subject⁷⁴ leaves one to wonder whether the court would now persist in standing on the contract theory or would join the procession to opposing views, or because the whole body of authority of recent years consists of *dicta*,⁷⁵ which are not always very clear or very relevant or very positive.⁷⁶

Outside of the jurisdictions where it was anciently established, the doctrine has had little appeal to the judiciary. Occasionally

(1937); *Medlin v. Ebenezer Methodist Church*, 132 S. C. 498, 129 S. E. 830 (1925); *Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290 (1895); see *Gillis v. White*, 214 Ala. 22, 106 So. 166 (1925); *McCalley v. Wilburn*, 77 Ala. 549, 552 (1884); *Danforth v. Timmerman*, 65 S. C. 259, 260, 43 S. E. 678 (1902). Indeed in South Carolina, the doctrine of the progenitor case, *Edings v. Brown*, 1 Rich. L. 255 (1845), discussed *supra* note 7, that contract was a permissible form of action has been enlarged into the holding that it is the exclusive method of enforcing the agent's liability, *cf. Coral Gables, Inc. v. Palmetto Brick Co.*, *supra* (refusing to allow amendment of a complaint to set up that the agent "made false and fraudulent representations" to the effect that he was authorized, on the ground that no recovery could be had on that basis).

⁷⁴ *Tervilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404 (1885); *Brown v. Johnson*, 20 Miss. 398 (1849); *Weare v. Gove*, 44 N. H. 196 (1862).

⁷⁵ See *Hawkins v. Wilson*, 94 Vt. 417, 420, 111 Atl. 634 (1920); *Snow v. Hix*, 54 Vt. 478, 482 (1882) (quoting with approval Story, to the effect that the ground of liability "is an implied guaranty that he has authority" but referring to "the general rule . . . that an agent who fails to bind his principal binds himself"); *State v. Smith*, 48 Vt. 266, 284 (1876) *semble*. On the sole occasion when the Supreme Court of Tennessee has adverted to the matter of agent's liability to third persons for exceeding authority, the *dictum* would seem to reaffirm the theory of contract liability, see *Woodard v. Bird*, 105 Tenn. 671, 684, 59 S. W. 143 (1900). The intermediate courts of the state have departed from that rationale approved by the highest court and, relying on decisions from other jurisdictions, have grounded liability squarely on an implied warranty of authority, *cf. Woodard v. Beazley*, 2 Tenn. Ch. App. 339 (1902); see *Memphis Cotton Press & Storage Co. v. Hanson*, 4 Tenn. App. 293, 302 (1926). *But cf. Luttrell v. White*, 42 S. W. 61 (Tenn. Ch. App. 1896).

⁷⁶ The present status of the Pennsylvania law is highly uncertain. The state supreme court, well after *Collen v. Wright*, certainly adhered to the contract theory, *Lasher v. Stimson*, 145 Pa. 30, 23 Atl. 552 (1891); *cf. Harper v. Jackson*, 240 Pa. 312, 315, 87 Atl. 430 (1913) (for agent, in action of assumpsit for damages under a lease made in excess of authority and renounced by the principal, the decision resting on matters wholly unrelated to the form of the action and no objection thereto being voiced by court or counsel); see *Kroeger v. Pitcairn*, 101 Pa. 311, 317 (1882). It has, however, sustained recovery in an action of trespass against an over-assuming agent, *Lane v. Corn*, 156 Pa. 250, 25 Atl. 830 (1893), the unauthorized act of releasing a lien having been non-contractual in character, however, so that probably recovery, under the facts, would have to be on some other ground in any event; and moreover has casually referred in at least one instance to "the right to hold" the agent "for breach of an implied warranty of his authority", see *Harper v. Jackson*, *supra* at 315. In order to avoid the concept of feeding the estoppel, relevant in contract and irrelevant in non-contract states, it has resorted to a somewhat strained construction of the

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by clear dictum⁷⁷ or unclear inference⁷⁸ some previously uncommitted court has indicated its assent to the contract approach; but, so far as actual holdings go, there seems not to have been a single new recruit following the decision of *Collen v. Wright*. Quite an extensive body of citations can be assembled to cases where the courts in random language, frequently adapted from some of the earlier cases or treatises, have suggested that an agent acting in excess or absence of authority and so failing to bind his principal to the contract "binds himself" or have tossed out other remarks of similar tenor;⁷⁹ but no one can take such casual statements very

rules with respect to equal opportunity for information, in a situation which could readily have been handled if the contract theory were flatly rejected, *of* *Mott v. Kaldes*, 288 Pa. 264, 135 Atl. 764 (1927). However, both *Mott v. Kaldes* and *Harper v. Jackson*, the two most recent cases to come before it, involved situations where the agent's authority was defective because not in writing as required by the Statute of Frauds under the circumstances; and it is hard to tell whether the cases represent an edging away from the court's traditional analysis in terms of contract liability which it does not yet feel like candidly disavowing, or whether they were dictated by a strong policy to prevent the whittling down of the effect of the Statute of Frauds requirements, a consequence which was expressly reprehended in *Mott v. Kaldes*. The lower courts have rather consistently accepted as the law of the jurisdiction the proposition that the agent's liability is as a substituted party to the contract, *Lukins v. Crozier*, 84 Pa. Super. 402 (1925); *Stiteler v. Ditzzenberger*, 45 Pa. Super. 266 (1911); *Wolff v. Wilson*, 28 Pa. Super. 511 (1905); *Lee Lash Co. v. Lyric Theatre Co.*, 28 Pa. Dist. 264 (1916); *accord* *Simpson v. Kerkeslager*, 41 Pa. Super. 347 (1909). *But cf.* *Wanamaker v. Weintraub*, 17 Pa. Dist. & Co. 37 (1931). Perhaps no more can be said than that the long-established rule of contract liability has not yet been abandoned and is faithfully followed by the lower courts, but that the Supreme Court's treatment of it is reminiscent of the behavior of courts in other jurisdictions when they have been preparing to change front on the question.

⁷⁷ See *Lois Grunow Memorial Clinic v. Davis*, 49 Ariz. 277, 291, 66 P. (2d) 238 (1937).

⁷⁸ *Cf.* *Amidon v. Bettex*, 102 Colo. 162, 167, 77 P. (2d) 1032 (1938) (discussion ambiguous and consistent with practically any theory of liability, but decision affirming judgment against an agent in an "action . . . for recovery of real estate broker's commission").

⁷⁹ See *Downs v. Bankhead*, 44 App. D. C. 101, 105 (1915); *Hunt v. Adams*, 111 Fla. 164, 166, 149 So. 24 (1933); *Klay v. Bank of Dallas Center*, 122 Iowa 506, 511, 98 N. W. 315 (1904); *Andrews v. Tedford*, 37 Iowa 314, 316 (1873); *Brady v. Mutual Benefit Dept., O. R. C.*, 215 Ky. 177, 179, 284 S. W. 1045 (1926); *Boatmen's Bank v. Gillespie*, 209 Mo. 217, 259, 108 S. W. 74 (1907); *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356, 364, 30 S. W. 163 (1895); *International Store Co. v. Barnes*, 3 S. W. (2d) 1039, 1041 (Mo. App. 1928); *Owen v. Hadley*, 186 Mo. App. 1, 10, 171 S. W. 973 (1914); *Bradshaw v. Cochran*, 91 Mo. App. 294, 297 (1901); *Duffy v. Mallinkrodt*, 81 Mo. App. 449, 455 (1899); *Anderson v. Stapel*, 80 Mo. App. 115, 124 (1899); *Rowland v. Hall*, 121 App. Div. 459, 106 N. Y. Supp. 55, 57 (1907); *Fulton v. Sewall*, 116 App. Div. 744, 102 N. Y. Supp. 109, 111 (1907); *Cobb v. Glenn Boom & Lumber Co.*, 57 W. Va. 49, 55 and syllabus 4, 49 S. E. 1005 (1905); *Rosendorf v. Poling*, 48 W. Va. 621, 624 and syllabus 1, 37 S. E. 555 (1900); *Curry v. Hale*, 15 W. Va. 867, 875 and syllabus 2 (1879); *Fredenall v. Taylor*, 23 Wis. 538, 540 (1868); *Dennison v. Austin*, 15 Wis. 334, 34d (1862); *cf.* *McCann v. Clark*, 166 Iowa 705, 714, 148 N. W. 1025 (1914); *Western Cement*

seriously after noticing how they recur in opinions from jurisdictions which, as will later be seen, have upon deliberation definitely rejected the contract analysis. Sometimes they seem to have served as a form of convenient vagueness employed in the transition period while the court was passing over from that to alternative theories of liability. Sometimes they keep cropping up even after the court has renounced the idea of liability on the contract. In no case should one safely credit them as more than vestigial and functionless remains of former doctrine, with which the law is so liberally littered. Almost without exception, lawyers who have relied on them have relied to their chagrin and their clients' loss.

The legislatures have shown a certain receptiveness to the notion of holding the overstepping agent liable as a principal in the transaction. In Louisiana, the Civil Code, deriving from sources outside the common law heritage of the other states, makes the agent's unauthorized contracts or dealings the agent's own,⁸⁰ and the courts of the state in a series of decisions have vigorously enforced the statutory provisions.⁸¹ Drawing on the early doctrines of their author's native New York, the Field Codes also incorporated the same idea, although with considerable qualifications and curiously interwoven with recognition of the warranty theory;⁸² and in

Co. v. Jones, 8 Mo. App. 373, 376 (1880); Fowle v. Kerchner, 87 N. C. 49, 62 (1882). Myers Tailoring Co. v. Keeley, 58 Mo. App. 491 (1894) rests pretty explicitly on the contract rationale but its reasoning has been characterized as *dictum* by Griswold v. Haas, 277 Mo. 255, 261, 210 S. W. 356 (1918).

⁸⁰ LA. CIVIL CODE (Dart, 1932) art. 3013, "The mandatory is responsible to those with whom he contracts, only when he has bound himself personally, or when he has exceeded his authority without having exhibited his powers"). This provision traces to LA. CIVIL CODE 1808, art. 24.

⁸¹ *Richie v. Bass*, 15 La. Ann. 668 (1860) (applying rule to agent acting under parol authority although statute speaks only in terms of agents with written powers); *Vordenbaumen v. Gray*, 189 So. 342 (La. App. 1939); cf. *Dodd, Brown, & Co. v. John Bishop & Co.*, 30 La. Ann. 1178 (1878); *Hewitt v. Roudebush*, 24 La. Ann. 254 (1872); *Opelousas St. Landry Bank & Trust Co. v. Bruner*, 13 La. App. 337, 125 So. 507 (1929). "... The pretended agent is . . . responsible in the precise terms of the contract". *Richie v. Bass*, *supra* at 670. But a limited agent will not be presumed to have exceeded his powers in contracting; that fact must be alleged and shown. *Bain v. Mann*, 15 La. App. 464, 131 So. 492 (1930).

⁸² "One who acts as an agent thereby warrants to all who deal with him in that capacity, that he has the authority which he assumes.

"One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: (1) When, with his consent, credit is given to him personally in a transaction; (2) When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or (3) When his acts are wrongful in their nature". CAL. CIVIL CODE (Deering, 1941) §§ 2342, 2343; 3 MONT. REV. CODES (Anderson & McFarland, 1935) §§ 7967, 7968; 1 N. D. COMP. LAWS (1913) §§ 6358, 6359; 1 S. D. CODE (1939) §§ 3.0401, 3.0402.

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those states where the Field Codes were adopted the unauthorized activities of the agent have been charged to him as his personal undertakings and transactions so far as the statute directs that to be done,⁸³ although with a marked lack of enthusiasm on the part of the courts for their peculiar doctrine.⁸⁴ Infelicities of draftsman-ship in section 20 of the Uniform Negotiable Instruments Law⁸⁵ have provoked a spirited controversy as to whether an agent who, with adequate disclosure but inadequate authority, signs negotiable paper for his principal is to be made the subject of a special exception and held to liability on the contract because of the nature of the contract. In a leading case, *New Georgia National Bank v. Lippman*,⁸⁶ the New York Court of Appeals reverted to its early fondness for the doctrine of contract liability. On the other hand, the Supreme Court of Appeals of West Virginia, in an able early opinion, *Haupt v. Vint*,⁸⁷ came out strongly against the contractual theory and in favor of handling the matter on generally prevailing principles of agency law. About the most that can be said is that opinions among the states have varied, with the decided majority inclined to follow Judge Cardozo in finding, within the recesses of section 20, a manifestation of a purpose that the agent be held on the contract.⁸⁸ Finally, there are scattered specialized statutes dealing with particular types of agents and imposing personal liability as an instrumental device for compelling compliance with

⁸³ *Nicholls Grain & Milling Co. v. Jersey Farm Dairy Co.*, 134 Cal. App. 126, 24 P. (2d) 925 (1933); *Borton v. Barnes*, 48 Cal. App. 589, 192 Pac. 307 (1920); *Kennedy v. Stonehouse*, 13 N. D. 232, 100 N. W. 258 (1904).

⁸⁴ *Kennedy v. Stonehouse*, 13 N. D. 232, 241, 100 N. W. 258 (1904) ("Few, if any, courts have in recent years, when not controlled by statute, followed this rule. Indeed, it seems to have been utterly repudiated both in England and in this country, including New York, where it had its origin. . . . So far as this case is concerned, it may be conceded that the modern doctrine is the better one and that the earlier one is . . . utterly illogical and absurd. With this question, however, we have no present concern, for the Legislature, acting within its authority, has plainly declared the earlier rule to be the law in this jurisdiction"); cf. *Arnold v. Genzberger*, 96 Mont. 358, 31 P. (2d) 396 (1934) (refusing to hold agent personally liable on contract where his acts, if in excess of authority, were not within the specific categories mentioned in the Code.)

⁸⁵ "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is *not liable* on the instrument *if he was duly authorized*; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability". (Italics supplied).

⁸⁶ 249 N. Y. 307, 164 N. E. 108, 60 A. L. R. 1344 (1928).

⁸⁷ 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518 (1911).

⁸⁸ The matter received extensive consideration in the legal periodical literature following the *New Georgia National Bank* case. Compare Comment (1931) 5 *TULANE L. REV.* 281 (approving that case) with Comment (1929) 9 *B. U. L. REV.* 206 (attacking it and supporting the position of *Haupt v. Vint*).

other laws. Such are those which address themselves to agents of foreign insurance companies not qualified to operate within the state⁸⁹ or to school board members contracting debts in excess of current available levies.⁹⁰ In cases falling within their terms, such statutes are, of course, applied.⁹¹ They have, however, been characterized as penal statutes and fair game for the rough handling of a "strict construction".⁹² More characteristically than the strange receptiveness of many courts to the contract theory in connection with negotiable instruments,⁹³ this and the chilly hospitality to the ideas embedded in the Field Codes seem to reflect the judicial attitude toward legislative toying with the notion of holding the agent on the contract; and their antipathy is itself a good indicator of the low estate to which the contract theory has fallen.

The most conspicuous thing about that theory, of late years, is the extent to which it has been repudiated. Of the states which had grounded liability on some other basis prior to *Collen v. Wright*, not a one has changed its mind; indeed, every one of them has not only successfully dissembled its love but has on one or more occasions briskly kicked the contract approach downstairs.⁹⁴ This

⁸⁹ *E. g.*, W. VA. CODE (Michie, 1937) c. 33, art. 7, § 12 ("The agent of any insurance company, which has not been authorized to transact business in this state, shall be personally liable upon all contracts made by or through him, directly or indirectly, for or in behalf of any such company"). Similar provisions exist in other states.

⁹⁰ W. VA. CODE 1899, c. 45, § 45. The statute was amended and enlarged by Acts 1904, c. 16, §§ 3, 4. *Cf.* W. VA. CODE (Michie, 1937) c. 12, art. 3, § 17 (Liabilities Incurred by State Boards, Commissions, Officers or Employees Which Cannot be Paid Out of Current Appropriations . . . Any member of a state board or commission or any officer or employee violating any provision of this section shall be personally liable for any debt unlawfully incurred or for any payment unlawfully made").

⁹¹ *Cf.* *Gates v. Justice*, 107 W. Va. 331, 148 S. E. 197 (1929) (insurance agents). For a review of the cases applying the insurance agent legislation, see 1 COOLEY, BRIEFS ON INSURANCE (2d ed. 1927) 491-495; 32 C. J. (1923) 1001.

⁹² See, *e. g.*, *Coberly v. Gainer*, 69 W. Va. 699, 702, 72 S. E. 790 (1911) (which refused to hold school board members personally liable on a debt charged on future levies, such contracts being prohibited by a provision immediately preceding one forbidding the contracting of debts in excess of the aggregate of funds available for the current year, but the personal liability section mentioning only exceeding the aggregate of current levies in prescribing personal liability); *Stephenson v. Dodson*, 36 Pa. Super 343, 351 (1908); *accord Hall v. Crandall*, 29 Cal. 567 (1866) (construing statute as to personal liability of corporate directors on irregularly formed contracts).

⁹³ Even here, however, there is some tendency to whittle down the broad application of the statute, *cf.* *Eliason State Bank v. Montevideo Baseball Ass'n*, 160 Minn. 341, 200 N. W. 300 (1924) (payee fully cognizant of facts respecting authority not entitled to recover against unauthorized agent on promissory note).

⁹⁴ *Senter v. Monroe*, 77 Cal. 347, 19 Pac. 580 (1888); *Wallace v. Bentley*, 77 Cal. 19, 18 Pac. 788 (1888); *Lander v. Castro*, 43 Cal. 497 (1872); *Hall v.*

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is not very conclusive of any change in the relative degree of acceptance of the various theories, but it stands in significant contrast to the situation in the original-contract-theory states, many of which have been detached from that analysis. Most dramatic perhaps was the change of front in New York State, the bellwether of the doctrine that the agent who exceeded his authority was himself liable on the unauthorized contract. Announced in an opinion⁹⁵ written very shortly after *Collen v. Wright*, the renunciation of that notion of thrusting personal liability on the agent as a party to the transaction has been confirmed and reiterated in a steady series of decisions⁹⁶ and, except for statutory modifications, it is clearly the settled rule now, in New York as well as in Massachusetts, that liability rests on another footing. Other jurisdictions have followed the same course and disavowed the contract rationale⁹⁷—perhaps as many, all told, as have maintained strict allegiance to it. But the

Crandall, 29 Cal. 567 (1866); Sullivan v. Mancini, 103 Conn. 110, 130 Atl. 79 (1925); Chieppo v. Chieppo, 88 Conn. 233, 90 Atl. 940 (1914); Jacobs v. Williams, 85 Conn. 215, 82 Atl. 202 (1912); Taylor v. Shelton, 30 Conn. 122 (1861); Gilmore v. Bradford, 82 Me. 547, 20 Atl. 92 (1890); Simpson v. Garland, 76 Me. 203 (1884); Noyes v. Loring, 55 Me. 408 (1867); Mendelsohn v. Holton, 253 Mass. 362, 149 N. E. 38 (1925); Bartlett v. Tucker, 104 Mass. 336 (1870); Draper v. Massachusetts Steam Heating Co., 87 Mass. 338 (1862); Hedgecock v. Tate, 168 N. C. 660, 85 S. E. 34 (1914); Russell v. Koonce, 104 N. C. 237, 10 S. E. 256 (1889); accord *People's Nat. Bank v. Dixwell*, 217 Mass. 436, 105 N. E. 435 (1914); *LeRoy v. Jacobosky*, 136 N. C. 443, 48 S. E. 796 (1904); see *Craft Refrigerating Co. v. Quinipiac Brewing Co.*, 63 Conn. 551, 563, 29 Atl. 76 (1893).

⁹⁵ *White v. Madison*, 26 N. Y. 117, 122-3 (1862) ("The defendant, having executed the note in the name of Snow, without authority would be held liable, according to several decisions in this State, as the maker of the note. The authority of these cases has been somewhat shaken by the remarks of the judges who delivered opinions in the case of *Walker v. Bank of State of New York*, 9 N. Y. 582; and in England, as well as in several of the United States, the principle upon which they rest, if they are supposed to present the only ground of liability of the agent, has been substantially modified. If it were necessary, in disposing of the present case, to decide the question, whether, as a general principle, one entering into a contract in the name of another, without authority, is to be himself holden as a party to the contract, I should hesitate to affirm such a principle. By that rule, courts would often make contracts for parties which (they) neither intended nor would have consented to make"). *Walker v. Bank of State of New York*, *supra*, had suggested that the contract theory of liability was to be limited to cases where the contract was written and the principal's name could be stricken from it, thus effecting a sort of reformation in actions at law; but it went off on other grounds.

⁹⁶ *Moore v. Maddock*, 251 N. Y. 420, 167 N. E. 572 (1929); *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640 (1885); *Baltzen v. Nicolay*, 53 N. Y. 467 (1873); *Dung v. Parker*, 52 N. Y. 494 (1873); *Weiss v. Baum*, 218 App. Div. 83, 217 N. Y. Supp. 820 (1926); cf. *Taylor v. Nostrand*, 134 N. Y. 108, 110, 31 N. E. 246 (1892).

⁹⁷ *Emmert v. Jelsma*, 191 Iowa 424, 182 N. W. 652 (1921); *Groeltz v. Armstrong*, 125 Iowa 39, 99 N. W. 128 (1904); *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 357, 79 N. W. 261 (1899); *Griswold v. Haas*, 277 Mo. 255, 210 S. W. 356 (1918) (stating this to be the established Missouri rule but citing no cases);

most important group of jurisdictions numerically is composed of those which have come to the question as a matter of first impression since 1857. It has already been seen that in not a single one has there been an unequivocal acceptance of the idea that the agent, failing to bind his principal to the contract by reason of his having assumed an unpossessed authority, thereupon binds himself to it.⁹⁸ On the other hand, state after state has firmly and distinctly declared that the agent's liability, whatever it may be, is not liability on the contract.⁹⁹

There has been some hedging in cases where the agent has himself received the consideration under the agreement, particularly if he has retained it without paying it over to his disclosed principal, with a few cases suggesting that, in such a state of facts, the false assumption of authority may be waived and the action

Herold v. Pioneer Trust Co., 211 Mo. App. 194, 242 S. W. 124 (1922); Griswold v. Hass, 145 Mo. App. 578 (1909); Henry Pauk & Sons Mfg. Co. v. American Car Co., 72 Mo. App. 344 (1897); Patterson v. Lippincott, 47 N. J. L. 457, 1 Atl. 506 (1885); *accord* Doolittle v. Murray, 134 Iowa 536, 111 N. W. 999 (1907); see Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135, 138 (1897). The intermediate courts of Tennessee have taken a similar position, but seem, in doing so, not to be in entire harmony with the most recent expression of views by the state supreme court, *supra* note 75.

⁹⁸ *Supra*.

⁹⁹ Haupt v. Vint, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518 (1911) (leading case); Kent v. Addicks, 126 Fed. 112, 60 C. C. A. 660 (C. C. A. 3d, 1903); Clements v. Citizens' Bank, 177 Ark. 1085, 9 S. W. (2d) 568 (1928); Benjamin v. Mattler, 3 Colo. App. 227, 32 Pac. 837 (1893) (alternative holding); Tedder v. Riggins, 65 Fla. 153, 61 So. 244 (1913); Hill v. Daniel, 52 Ga. App. 427, 183 S. E. 662 (1936); Ruffner v. Dunlop, 32 Ga. App. 693, 124 S. E. 544 (1924); Seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340 (1899); Hancock v. Yunker, 83 Ill. 208 (1876); Duncan v. Niles, 32 Ill. 532 (1863); Neufeld v. Beidler, 37 Ill. App. 34 (1890); Sheffield v. Ladue, 16 Minn. 346 (1871); Brong v. Spence, 56 Neb. 638, 77 N. W. 54 (1898); Cole v. O'Brien, 34 Neb. 68, 51 N. W. 316 (1892); Farmers' Co-op. Trust Co. v. Floyd, 47 Ohio St. 525, 26 N. E. 110 (1890); American Surety Co. v. Morton, 32 Okl. 687, 122 Pac. 1103 (1912); Hermann v. Clark, 108 Ore. 457, 219 Pac. 608 (1923); Roby First State Bank v. Hilbun, 61 S. W. (2d) 521 (Tex. Civ. App. 1933); White v. Roughton, 201 S. W. 679 (Tex. Civ. App. 1918); Heard v. Clegg, 144 S. W. 1145 (Tex. Civ. App. 1912); Christensen v. Nielson, 73 Utah 599, 276 Pac. 645 (1929); Forrest v. Hawkins, 169 Va. 470, 194 S. E. 721 (1938); Boelter v. Hilton, 194 Wis. 1, 215 N. W. 436 (1927) (most recent of a fluctuating series of Wisconsin cases, discussed in detail *infra* note 104) see Eisinger v. E. J. Murphy Co., 48 App. D. C. 476, 479 (1919); Hagan v. Asa G. Candler, Inc., 59 Ga. App. 587, 1 S. E. (2d) 693, 696 (1939); Simmonds v. Long, 80 Kan. 155, 158, 101 Pac. 1070 (1909); *cf.* The Serapis, 37 Fed. 436 (S. D. N. Y. 1889) (rule in admiralty); New York & Charleston S. S. Co. v. Harbison, 16 Fed. 681, 685 (C. C. D. Conn. 1883); Roby v. Cossitt, 78 Ill. 638 (1875) (bill for specific performance of land contract not appropriate way to enforce liability of agent who signed it without authority); Mueller v. Nugent, 187 Ky. 61, 66, 218 S. W. 730 (1920); King v. Russell, 172 Mich. 529, 270 N. W. 775 (1936). But *cf.* Amidon v. Bettex, 102 Colo. 168, 77 P. (2d) 1032 (1938) discussed *supra* note 78.

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grounded on the implied assumpsit¹⁰⁰ (a proposition which I hope to examine somewhat in the successor article) but even here the courts are careful to make it clear that in no event is he to be charged as a substitute party to the express agreement. Even in Field Code jurisdictions, the courts have recognized that the legislatively prescribed rule of liability on the contract is opposed to authority and offensive to reason¹⁰¹ and have, in cases where the statute is not by its express terms applicable or is not drawn to their attention, aligned themselves with the states which reject the contract approach.¹⁰² Quite commonly, as has already been noted, one does meet with random remarks and desultory *dicta* redolent of contract liability, even in jurisdictions where it has been definitely rejected; and here and there the result of a case seems easily consistent with that theory and not obviously explainable on others.¹⁰³ Such judicial lapses and aberrations are entitled to slight weight in the face of the positive repudiation of that analysis by the same courts.¹⁰⁴ As nearly as one can make any flat assertion with assurance, it may be said that the idea of holding the agent as a party to the unauthorized contract or transaction has been repudiated by the overwhelming weight of judicial authority and only lingers on in stray instances by force of tradition or as a creature of the legislature.

¹⁰⁰ Cf. *Dimock v. Westerhoff*, 117 Conn. 659, 166 Atl. 756 (1933); *Simmonds v. Long*, 80 Kan. 155, 158, 101 Pac. 1070 (1909); *Noyes v. Loring*, 55 Me. 408, 413 (1867); *Jefts v. York*, 64 Mass. 392 (1852); *LeRoy v. Jacobosky*, 136 N. C. 443, 453, 48 S. E. 796 (1906); *Russell v. Koonce*, 104 N. C. 237, 241, 10 S. E. 256 (1839).

¹⁰¹ See *Kennedy v. Stonehouse*, 13 N. D. 232, 241, 100 N. W. 258 (1904).

¹⁰² Cf. *Senter v. Monroe*, 77 Cal. 347, 19 Pac. 580 (1888); *Wallace v. Bentley*, 77 Cal. 19, 18 Pac. 788 (1888); *D. B. Rose, Inc. v. Hodge Transp. System*, 121 Cal. App. 332, 8 P. (2d) 913 (1932); *Kohlberg v. Havens*, 41 Cal. App. 222, 182 Pac. 467 (1919); *Arnold v. Genzberger*, 96 Mont. 358, 31 P. (2d) 396 (1934); *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607 (1894).

¹⁰³ Cf. *Klay v. Bank of Dallas Center*, 122 Iowa 506, 98 N. W. 315 (1904); *Andrews v. Tedford*, 37 Iowa 314 (1873) (alternative holding); *International Store Co. v. Barnes*, 3 S. W. (2d) 1039 (Mo. App. 1928); *Danser v. Dorr*, 72 W. Va. 430, 78 S. E. 367 (1913).

¹⁰⁴ The course of decision in Wisconsin suggests the inconsistencies possible where a court fails to distinguish clearly and constantly the several theories of liability. The earliest case announced the doctrine that, if the agent failed to bind the principal on the contract, he bound himself, and sustained a recovery against an agent in an action on a promissory note, *Dennison v. Austin*, 15 Wis. 334 (1862). This was soon followed by a decision declaring the over-assuming agent "liable only in an action *ex delicto*" and stating as a requirement that "there must be some wrong or omission of right on his part", *McCurdy v. Rogers*, 21 Wis. 197, 202, 201 (1866), but, after only two years, the court, without noticing the intervening decision, cited the prior case in support of the rule as to binding principal or agent alternatively, although the proposition would seem not to have been essential to the decision, see *Fredendall v. Taylor*, 23 Wis. 538, 540 (1868). A considerable time elapsed before the

The rub comes in determining on what basis the agent is liable. Since, in practice, it is often enough to decide that he is not liable on the contract, many of the cases do not go beyond that proposition and hence the body of affirmative information is much slighter than that negating contract liability. Moreover much of what there is is completely inconclusive.

Many of the cases are utterly vague, contenting themselves

matter arose again. When it did, the court, relying largely on Mechem's treatise and New York decisions, and with no reference to earlier Wisconsin cases, came out for the doctrine that "Later and better considered opinion seems to be that liability. . . rests upon implied warranty of authority", *Oliver v. Morawetz*, 97 Wis. 332, 340, 72 N. W. 877 (1897). In the next case, after another considerable interval, the court returned to the notion of the *Dennison* and *Fredendall* cases, *supra*, stating that "one who, professing to contract as agent for another, fails to bind such other is himself liable as principal", and holding an agent liable in an action for damages for breach of an agreement to buy land, *Wisconsin Farm Co. v. Watson*, 160 Wis. 638, 640, 152 N. W. 449 (1915). Three years later agents were made to pay brokerage fees called for under the contract of employment with one whom they had hired in excess of their authority; but the court sidestepped the basis of liability, contenting itself with stating that they were "personally liable" and citing only *Oliver v. Morawetz*, *supra*, to the neglect of all the contract-liability cases, thus perhaps remotely indicating *rapprochement* to the warranty theory, *Roberts v. Goodlad*, 167 Wis. 318, 166 N. W. 646 (1918). The retreat from the contract theory was more marked in *Outagamie National Bank v. Tesch*, 171 Wis. 249, 177 N. W. 6 (1920), wherein an agent who, without authority, signed his principal's note as guarantor was held not subject to an action on the written guaranty, the court remarking that "He can be held liable, if at all, either on the ground that there was some element of deceit or fraud. . . or on the ground that there was an express or implied warranty on his part. . .", *id.* at 252. *Grieb & Erickson, Inc. v. Estberg*, 186 Wis. 174, 202 N. W. 331 (1925), again held agents liable for the contract amount of a land brokerage commission, but rested on *Oliver v. Morawetz*, *supra*, and spoke in terms of holding out and reliance on representations, thus, it would seem, maintaining the position taken in *Outagamie National Bank v. Tesch*, *supra*. *Boelter v. Hilton*, 194 Wis. 1, 215 N. W. 436 (1927), which followed, for the first time took cognizance of the inconsistencies of statement in the Wisconsin cases; and Judge Rosenberry, after a review of some of them, deliberately rejected the contract theory, declared that "the ground of his (agent's) liability is the false representation or his implied warranty of authority according to the facts in each case", and explained the declarations as to contract liability as meaning "no more than that in certain classes of cases the extent of the agent's liability was measured by the contractual obligation which he assumed to enter into on behalf of his principal and therefore constituted a proper measure of damages", *id.* at 6. This seems to be the most recent relevant case and perhaps has set the matter at rest. The experience in this jurisdiction is especially interesting since every theory, singly or in combination with every other, seems, at one time or another, to have been proclaimed with all shades of clarity and ambiguity, and the court has wound up rejecting the contract theory but resorting to the alternative form of statement which avoids definite commitment to either of the other two. Perhaps the four most recent cases, considered together, support the inference that there is concurrent tort or warranty liability where the agent has made some express statement about his authority, but none where he has simply gone ahead and acted as if he possessed it. This suggestion seems to be vaguely implicated in their language and results, but it is only very tentatively advanced by the writer.

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with the announcement that, in the event he has acted beyond his authority, the agent is "personally liable" or "personally responsible" or the like,¹⁰⁵ or that the action must be "for damages" or for any attendant damage,¹⁰⁶ sometimes with the explanation that such damages are grounded on his false assumption of authority to act.¹⁰⁷ This is slippery stuff. Indeed, such language, or some of it at any rate, is perfectly consistent with the contract analysis,¹⁰⁸ and the only justification for excluding it is because the jurisdiction or the very opinion has, in other and less equivocal statements, repudiated it.¹⁰⁹

¹⁰⁵ See *Lasater v. Crutchfield*, 92 Ark. 535, 538, 123 S. W. 394 (1909); *Clark v. Eshleman*, 5 Colo. 107, 112 (1881); *Willingham v. Glover*, 28 Ga. App. 394, 111 S. E. 206, 208 (1922); *Peeples v. Perry*, 18 Ga. App. 369, 89 S. E. 461, 463 (1916); *Murray v. Carothers*, 58 Ky. 71, 81 (1858); *Sandford v. McArthur*, 57 Ky. 411, 421 (1857); *Magaw v. Beals*, 242 Mass. 321, 324, 136 N. E. 174 (1922); *Pratt v. Beaupre*, 13 Minn. 177, 179 (1868); *Rollins v. Phelps*, 5 Minn. 373, 377 (1861); *Sanborn v. Neal*, 4 Minn. 83, 92 (1860); *Lingenfelder v. Leschen*, 134 Mo. 55, 63, 34 S. W. 1039 (1896); *Gestring v. Fisher*, 46 Mo. App. 603, 611 (1891); *Hall v. Lauderdale*, 46 N. Y. 70, 75 (1871); *Jackson v. Watkins*, 128 Ohio St. 407, 409, 191 N. E. 483 (1934); *Verschoye v. Holifield*, 90 S. W. (2d) 907, 910 (Tex. Civ. App. 1935); *Dunbar v. Hansen*, 68 Utah 398, 404, 250 Pac. 982 (1926); *Danser v. Dorr*, 72 W. Va. 430, 433, 78 S. E. 367 (1913); *Coberly v. Gainer*, 69 W. Va. 699, 703, 72 S. E. 790 (1911). *Johnson Milling Co. v. Brown*, 173 Md. 366, 369, 196 Atl. 100 (1937) is possibly more important than the above cases, as showing that the Maryland court is still unready to clarify its ancient indecision as to the nature of the liability, see *supra*. Oklahoma is perhaps to be classified along with Maryland in doctrinal coyness on the basis of *Duncan Electric & Ice Co. v. Dickey*, 72 Okla. 257, 259, 180 Pac. 703 (1919).

¹⁰⁶ See *Amidon v. Bettex*, 102 Colo. 162, 167, 77 P. (2d) 1032 (1938); *Russell v. Koonce*, 104 N. C. 237, 241, 10 S. E. 256 (1889); *White v. Roughton*, 201 S. W. 679, 680 (Tex. Civ. App. 1918); *Heard v. Glegg*, 144 S. W. 1145, 1147 (Tex. Civ. App. 1912).

¹⁰⁷ See *McCormick v. Seeberger*, 73 Ill. App. 87, 99 (1897); *Emmett v. Jelsma*, 191 Iowa 424, 428, 182 N. W. 652 (1921); *Newport v. Smith*, 61 Minn. 277, 278, 63 N. W. 734 (1895); *Russell v. Koonce*, 104 N. C. 237, 241, 10 S. E. 256 (1889).

¹⁰⁸ It seems quite clear that some of the cases speaking in terms of personal responsibility did have in mind liability on the contract. A representative instance is *Rollins v. Phelps*, 5 Minn. 373 (1861), where such language appears in conjunction with a supporting citation of the early New York cases which had evolved the doctrine of contractual liability. Indeed, it would appear from the context that most of the older opinions employing this sort of expression squinted in the direction of contract liability; but the convenient vagueness of the language permitted later judges to take a different tack, even while using identical phraseology, without the necessity for discrediting the earlier cases.

¹⁰⁹ In their general failure to treat such judicial language as committing them to a contract approach, the several courts would seem merely to be accepting, in connection with doctrines of *stare decisis*, the position taken in Georgia as a matter of statutory construction. GA. CODE (1933) § 4-409 provides that "Every agent exceeding the scope of his authority shall be individually liable to the person with whom he deals . . ."; but "The provision. . . embodies only a general rule of agency. Whatever under this statute might constitute the nature of and the remedy for such liability, the section creates no authority . . . for an action ex contractu against the agent on the unauthorized instrument itself". *Hill v. Daniel*, 52 Ga. App. 427, 183 S. E. 662, 663 (1936).

More illuminating but still not very precise is another considerable group of decisions which speak of liability alternatively for misrepresentation or for the breach of an implied warranty. Typical of this form of statement is the language in the important West Virginia case of *Haupt v. Vint*, where it was said:

"A person who signs the name of another to a contract as agent of the latter, without authority to do so, is not personally liable on the contract as promisor or covenantor, but is liable in an action of assumpsit, upon the implied warranty of his authority, or in trespass on the case, for fraud and deceit."¹¹⁰

This is representative of language which appears in a fair number of opinions from widely scattered jurisdictions.¹¹¹ Useful enough to dispose of the case at hand, which ordinarily pivoted about the question whether liability was directly on the contract, its discreet reticence does not fairly support either the warranty or the fraud analysis of liability.¹¹² Just a shade more informative (maybe) is

¹¹⁰ Syllabus 5.

¹¹¹ See *Eisinger v. E. J. Murphy Co.*, 48 App. D. C. 476, 479 (1919); *Peeples v. Perry*, 18 Ga. App. 369, 89 S. E. 461, 463 (1916); *Groeltz v. Armstrong*, 125 Iowa 39, 42, 99 N. W. 128 (1904); *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 357, 360, 79 N. W. 261 (1899); *Bloom v. Young*, 205 Ky. 142, 144, 265 S. W. 501 (1924); *Newland Hotel Co. v. Lowe Furniture Co.*, 73 Mo. App. 135, 138 (1897); *Roby First State Bank v. Hilbun*, 61 S. W. (2d) 521 (Tex. Civ. App. 1933); *Forrest v. Hawkins*, 169 Va. 470, 476, 194 S. E. 721 (1938); cf. *Emmert v. Jelsma*, 191 Iowa 424, 182 N. W. 652 (1921); *Kennedy v. Stonehouse*, 13 N. D. 232, 100 N. W. 258 (1904) (suggesting, without deciding, that even as to cases under the personal liability section of the Field Code, the agent may be concurrently liable for breach of warranty of authority or for deceit); *Christensen v. Nielsen*, 73 Utah 599, 276 Pac. 645 (1929). The Iowa cases, *supra*, indicate a practise in that state to include counts for both misrepresentation and breach of warranty in the same petition.

¹¹² Possibly what is meant is that warranty and deceit are equally permissible, mutually interchangeable grounds of recovery. That would seem at least to be the result ultimately reached as the result of a somewhat shifting course of decision in the Illinois Supreme Court. The earliest relevant case, *Duncan v. Niles*, 32 Ill. 532, 534 (1863) indicated agreement with the Massachusetts rule, paraphrased in the statement that "the only remedy . . . is an action on the case for falsely assuming authority to act as agent", and affirmed the lower court's action in sustaining a demurrer to an action of assumpsit, saying "if the defendant falsely represented himself as . . . agent . . . , he may be reached by a special action on the case for the fraud, or in some other appropriate action but not on the note itself". The next year, however, in *Wheeler v. Reed*, 36 Ill. 81, 91 (1864), the court said, "The agent, when sued upon such contract, can exonerate himself from personal responsibility only by showing his authority to bind those for whom he has undertaken to act", citing exclusively and approvingly cases following the New York rule of contract liability, without mention of its decision of the previous year. In *Hancock v. Yunker*, 83 Ill. 208 (1876), there was a return to the doctrine of *Duncan v. Niles*, *supra*, the language of *Wheeler v. Reed*, *supra*, being characterized as having been used merely by way of argument. But, in *Frankland v. Johnson*, 147 Ill. 520, 525, 35 N. E. 480 (1893), the court relied once more on *Wheeler v. Reed* and the

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the occasional case which, using similar language, qualifies the fraud and deceit half of the proposition by announcing that the agent is thus liable "in a proper case".¹¹³ Doubtless no implication is intended that the agent may be held liable on the warranty in an

New York contract-theory decisions, on which that case rested, to support its statement that "It is well understood that if the agent, either of a corporation or an individual makes a contract which he has no authority to make, he binds himself personally according to the terms of the contract", with no reference to either *Duncan v. Niles* or *Hancock v. Yunker*. This seems to be the last instance where this court has shown any hospitality to the contract theory, however. The next decision, *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340 (1899) marks the first appearance of the warranty theory in Illinois Supreme Court opinions; the contention was made, on the authority of *Duncan v. Niles* and *Hancock v. Yunker*, that an action for deceit was the exclusive available remedy in Illinois, but the court rejected the argument, saying, quite properly, that those cases involved only the question whether the agent could be sued on the contract itself without passing on the issue of warranty, querying why the tort could not be waived and assumpsit on the implied warranty maintained, rather vaguely remarking that "Doubtless, in many cases a recovery may be had in either form of action (warranty or deceit), but in others the character of the suit must be determined by the facts of the case", *id.* at 418, and holding that the complaint stated a good cause of action on the implied warranty while expressly reserving decision whether the case as made did not also authorize a recovery in case for misrepresentation. Adhering to and, in a sense, construing the *Seeberger* case, the court has since said, in *Golden v. Ellwood*, 299 Ill. 73, 77, 132 N. E. 323 (1921), "The ground of liability in cases where the contract contains no apt words to charge the agent on the covenants of the contract is based upon an implied warranty or upon fraud and deceit"; *cf.* *Equitable Trust Co. v. Taylor*, 330 Ill. 42, 47, 161 N. E. 62 (1928). The appellate courts, doubtless influenced by the confused course of decision in the Supreme Court, tended at an early period to hold the agent personally liable on the contract made without authority, *Rice v. Western Fuse & Explosives Co.*, 64 Ill. App. 603 (1896) (relying on *Wheeler v. Reed*, *supra*); *cf.* *Walker v. Hinze*, 16 Ill. App. 326, 328 (1885). In *McCormick v. Seeberger*, 73 Ill. App. 87 (1897), however, the ground of liability was said to be the false assumption of authority and the remedy to be either on the implied warranty or in deceit, with something of a preference shown for the latter. But, in *Reeb v. Bronson*, 196 Ill. App. 518 (1915), in disregard of the latest pronouncement by the Supreme Court in the *Seeberger* case, there was a resurrection of the contract-liability doctrine of the *Wheeler*, *Frankland*, and *Rice* cases, betokening the complete confusion into which the divagations of the Supreme Court had thrown the lower court judges. While, occasionally, the appellate courts have seemed to get in line with the current warranty-or-deceit rationale of the Supreme Court, *cf.* *Equitable Trust Co. v. Taylor*, 244 Ill. App. 345, 351 (1927), there is still a strong tendency to recur to the irreconcilable early decisions of that court, and notably to the *Frankland* case, see *Remington v. Krenn & Dato, Inc.*, 289 Ill. App. 548, 557, 7 N. E. (2d) 618 (1937); *Weissbrodt v. Elmore*, 262 Ill. App. 1, 13 (1931) (both stating that agent, if contracting without authority, is personally liable, and deriving from that liability the mutuality of obligation requisite to permit enforcement against third person who dealt with agent). To summarize, the law in this state, seems to be (1) supreme court law, that one may proceed against the agent in tort for misrepresentation or *ex contractu* on an implied warranty, as best suits plaintiff's convenience, but not directly on the contract, (2) appellate court law, harking back to abandoned supreme court cases and disregarding more recent ones, that the agent is personally liable on the unauthorized contract.

¹¹³ See, *e. g.*, *Griswold v. Haas*, 277 Mo. 255, 261, 210 S. W. 365 (1918).

improper case. Instead, the language evidently squints in the direction of the Restatement idea¹¹⁴ of liability on the warranty in the ordinary case, with supplemental recourse to fraud and deceit in the event the requisites for that action are independently made out. That this reading of somewhat doubtful phraseology is a permissible one is supported by the fact that precisely that notion has been stated by other courts, namely, that, in any case of misrepresented authority, the agent may be sued for breach of an implied warranty but that, if he knew or should have known of his want of authority, then a dual remedy against him exists and the injured third person may sue alternatively for such breach or in tort for fraud and deceit.¹¹⁵ It may be noted in passing that states staunchly adhering to the contract theory have rejected the idea that the agent is liable either in tort for deceit¹¹⁶ or on the warranty.¹¹⁷

Are there, then, no cases which choose between the fraud theory and the warranty theory? Yes, such decisions are here and there to be found.

Something like a half dozen jurisdictions have distinctly announced that the appropriate remedy is an action in the nature of an action on the case for deceit.¹¹⁸ In Massachusetts, where there

¹¹⁴ *Supra*.

¹¹⁵ "The party who has been induced to contract on the faith of the agent's authority has one of two remedies. If the agent honestly believed that he had an authority which he did not possess, he may be sued on an implied warranty of authority. If he knew, or—as in this case—ought to have known, that he had not the authority which he proposed to have, he may be sued in the action of deceit". *Chieppo v. Chieppo*, 88 Conn. 233, 239, 90 Atl. 940 (1914). Language substantially similar in tenor is found in *Henry Pauk & Sons Mfg. Co. v. American Car Co.*, 72 Mo. App. 344, 347 (1897); *American Surety Co. v. Morton*, 32 Okl. 687, syllabus and 689, 122 Pac. 1103 (1912); *Oliver v. Morawetz*, 97 Wis. 332, 340, 72 N. W. 877 (1897); *cf. Vertrees v. Heard*, 138 Ky. 83, 89, 127 S. W. 523 (1910).

¹¹⁶ *Barnes v. Ball*, 209 Ala. 618, 95 So. 812 (1923); *Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S. C. 478, 191 S. E. 337 (1937). The Indiana Appellate Court is opposed to this view, *cf. Sourwine v. McRoy Clay Works*, 42 Ind. App. 358, 85 N. E. 782 (1908) *semble*; *Mendenhall v. Stewart*, 18 Ind. App. 262, 47 N. E. 943 (1897); but this may merely confirm the doubt, arising from the antiquity of the last expression of the contract theory of liability by the supreme court of that state, whether that doctrine is still live law there.

¹¹⁷ *Lutz v. Van Heynigen Brokerage Co.*, 199 Ala. 620, 75 So. 284 (1917). But *cf. Kennedy v. Stonehouse*, 13 N. D. 232, 100 N. W. 258 (1904) (suggesting, without deciding, that an agent might be sued on the warranty or in deceit, even though the facts brought his case within the personal liability provisions of the Field Code).

¹¹⁸ See *Benjamin v. Mattler*, 3 Colo. App. 227, 231, 32 Pac. 837 (1893); *Gilmore v. Bradford*, 82 Me. 547, 549, 20 Atl. 92 (1890); *Teele v. Otis*, 66 Me. 329, 331 (1887); *Noyes v. Loring*, 55 Me. 408, 411 (1867); *Skaaraas v. Finnegan*, 32 Minn. 107, 19 N. W. 729 (1884); *Sheffield v. Ladue*, 16 Minn. 346, 351 (1871); *Cole v. O'Brien*, 34 Neb. 68, 70, 51 N. W. 316 (1892). In admiralty,

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are two kinds of action at law, *to wit*, actions in tort and actions in contract, it has been said that the agent can be held liable "only in an action for tort for falsely representing himself to be authorized";¹¹⁹ and the more recent suits to enforce the agent's liability seem uniformly to have been actions in tort for false and fraudulent representations, a choice which the court has inferentially or expressly approved.¹²⁰ In other states as well, the courts have spoken in terms of the gist of the plaintiff's action being the damages occasioned to him by the agent's false representations¹²¹ and have sustained recoveries against agents on pleadings which, so far as can be gathered from an examination of the reported decisions, contained allegations peculiarly appropriate to actions of tort for fraud with none sounding in contract.¹²²

On the other hand, there are cases from some ten or a dozen jurisdictions which, in their holdings, or, more usually, by way of descriptive dictum, characterize the liability as resting upon an implied warranty of authority.¹²³ Massachusetts, even, seemed

the remedy against a shipmaster executing a master's draft in excess of his authority must be upon a libel against him as a "wrong-doer", under rule 18, with the appropriate allegations, *The Serapis*, 37 Fed. 436 (S. D. N. Y. 1886).

¹¹⁹ See *Bartlett v. Tucker*, 104 Mass. 336, 339 (1870).

¹²⁰ Cf. *Lemery v. Twombly*, 281 Mass. 93, 183 N. E. 171 (1932); *Mendelsohn v. Holton*, 253 Mass. 362, 149 N. E. 38 (1925); *Peoples' Nat. Bank v. Dixwell*, 217 Mass. 436, 105 N. E. 435 (1914); *Conant v. Alvord*, 166 Mass. 311, 44 N. E. 250 (1896).

¹²¹ *Noyes v. Loring*, 55 Me. 408 (1867); *Wright v. Baldwin*, 51 Mo. 268 (1873); cf. *Senter v. Monroe*, 77 Cal. 347, 19 Pac. 580 (1888); *Wallace v. Bentley*, 77 Cal. 19, 18 Pac. 788 (1888); *Lander v. Castro*, 43 Cal. 497, 501 (1872); *Benjamin v. Mattler*, 3 Colo. App. 227, 234, 32 Pac. 837 (1893); *Simmonds v. Long*, 80 Kan. 155, 158, 101 Pac. 1070 (1909); *Sheffield v. Ladue*, 16 Minn. 346, 351 (1871); *Western Cement Co. v. Jones*, 8 Mo. App. 373, 376 (1880).

¹²² Cf. *Skaaras v. Finnegan*, 31 Minn. 48, 19 N. W. 729 (1883); *Duffy v. Mallinkrodt*, 81 Mo. App. 449 (1889); *Martin v. Holman*, 65 N. J. L. 37, 46 Atl. 723 (1900); *Hays v. Deeley*, 204 S. W. 1177 (Tex. Civ. App. 1918); *Collins v. Philadelphia Oil Co.*, 97 W. Va. 464, 125 S. E. 223 (1924) (holding agent liable in deceit for representing that his authority was more limited than was the case, to the injury of the plaintiff).

¹²³ *Williams v. DeSoto Oil Co.*, 213 Fed. 194 (C. C. A. 8th, 1914) (Arkansas law); *Kent v. Addicks*, 126 Fed. 112, 60 C. C. A. 660 (C. C. A. 3d, 1903); *Clements v. Citizens' Bank*, 177 Ark. 1085, 9 S. W. (2d) 569 (1928); *Hill v. Malvern First National Bank*, 129 Ark. 265, 195 S. W. 678 (1917); *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 2 S. W. 703 (1886); *Sullivan v. Mancini*, 103 Conn. 110, 130 Atl. 79 (1925); *Tedder v. Riffin*, 65 Fla. 153, 61 So. 244 (1913); *Mueller v. Nugent*, 187 Ky. 61, 218 S. W. 730 (1920); *Patterson v. Lippincott*, 47 N. J. L. 457, 1 Atl. 506 (1885); *Harriss v. Tams*, 258 N. Y. 229, 179 N. E. 476 (1932); *Moore v. Maddock*, 251 N. Y. 420, 167 N. E. 572 (1929); *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640 (1885); *Baltzen v. Nicolay*, 53 N. Y. 467 (1873); *White v. Madison*, 26 N. Y. 117 (1862); *Weiss v. Baum*, 218 App. Div. 83, 217 N. Y. Supp. 820 (1926); *Mickles v. Atlantic Brokerage Co.*, 209 App. Div. 182, 204 N. Y. Supp. 571 (1924); *Hedgecock v. Tate*, 168 N. C. 660, 85 S. E. 34 (1915); *Hermann v. Clark*, 108 Ore. 457, 219 Pac. 608 (1923);

about to take that view at one time¹²⁴ but, as has been seen in the preceding paragraph, the subsequent development has been away from it and in the direction of liability for the tort of deceit. Indeed, the most confusing feature of the whole thing is the way in which states which seem at one time to incline to the one theory on other occasions will switch over to the other,¹²⁵ so that, as to many of them, it is hard to tell where they do stand except that they definitely reject the contract analysis. About the most that can be said is that undoubtedly a respectable number of jurisdictions favor the doctrine of *Collen v. Wright*, that liability is on the implied warranty. Whether their relative preponderance is sufficient to justify the encyclopedia makers, the text writers, and the Restaters (if, indeed, the latter here purport to be stating the law as it now is) in their conclusions as to liability being grounded on implied warranty is a nice question. As among the three theories, it would indeed seem that of warranty has attracted rather more adherents than have either of the other two; at the same time, it has won something less than a majority of all states which have made a definite election.

What has caused much of the trouble is that warranty, in

Hinton v. Roethler, 90 Ore. 440, 177 Pac. 59 (1918); Sorenson v. Kribs, 82 Ore. 130, 161 Pac. 405 (1916); Anderson v. Adams, 43 Ore. 621, 74 Pac. 215 (1903); Cochran v. Baker, 34 Ore. 555, 52 Pac. 560, 56 Pac. 641 (1899); Woodward v. Beazley, 2 Tenn. Ch. App. 339 (1902); cf. Little Rock Furniture Mfg. Co. v. Kavanaugh, 111 Ark. 575, 586, 164 S. W. 289 (1914) *semble*; McCarty v. Love, 145 Miss. 330, 110 So. 795 (1927) *semble*; Taylor v. Nostrand, 134 N. Y. 108, 110, 31 N. E. 426 (1892); Dung v. Parker, 52 N. Y. 494, 499 (1873); New York Bank Note Co. v. M'Keige, 31 App. Div. 188, 52 N. Y. Supp. 597 (1898); Memphis Cotton Press & Storage Co. v. Hanson, 4 Tenn. App. 293, 302 (1926); White v. Roughton, 201 S. W. 679, 681 (Tex. Civ. App. 1918) *semble*; accord Darling Shops, Inc. v. Brack, 95 F. (2d) 135 (C. C. A. 8th, 1938) (Arkansas law); Farmers' Co-op. Trust Co. v. Floyd, 47 Ohio St. 525, 541, 26 N. E. 110 (1890). In California, the earlier cases, under the common law, seem to have gone on the theory of fraud and deceit, see California cases *supra*, note 121; but the Field Code speaks expressly in terms of the agent warranting his authority, CAL. CIVIL CODE (Deering, 1941) § 2342, and the more recent opinions which are under the statute follow its terminology, cf. Knoch v. Haizlip, 163 Cal. 146, 154, 124 Pac. 998 (1912) *semble*; Kohlberg v. Havens, 41 Cal. App. 222, 182 Pac. 467 (1919).

¹²⁴ Cf. May v. Western Union Tel. Co., 112 Mass. 90, 95 (1873) ("It is not an action for deceit . . . it is an action in the nature of a false warranty"); Boston & Albany R. R. v. Richardson, 135 Mass. 473, 475 (1883).

¹²⁵ Compare Simmonds v. Long, 80 Kan. 155, 158, 101 Pac. 1070 (1909) (stating that "as a general rule . . . the remedy against an agent who assumes to act for another without authority is an action for damages for the wrong done") with Crosby v. Livingston, 105 Kan. 418, 422, 185 Pac. 284 (1919) (quoting with approval the discussion in 31 CYC. 1545 as to warranty of authority). In both cases, the language was dictum, the action being in fact for money had and received; and the later one purported to be decided in express reliance on the earlier.

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common with other parol undertakings, started its career as a tort and has been slowly growing into a contract; and whether the agent's improper assumption of authority is called warranty or deceit is thus in danger of getting entangled with judicial convictions and uncertainties as to whether the warranty of authority has completely outgrown its pristine delictual stage and become a full-fledged contract. The courts articulate their reactions to this question of the tort or contract quality of the warranty obligation even more rarely than they do on the point of whether the gravamen of the action is warranty or deceit. Yet, even though they commit themselves squarely to the warranty theory, unless they give some indication of the category in which they regard this type of warranty as falling, they leave unanswered many of the really important issues with regard to agent's liability.

Occasionally one comes across a forthright characterization of warranty liability as contractual in character, with full acceptance of all that that implies as to the appropriate consequences, substantive and procedural.¹²⁶ Such a position, at least where the jurisdiction adheres rigidly to the warranty theory,¹²⁷ places the court in blunt disagreement with those which adopt the fraud theory as well as with those which insist on the waning contract rationale. Other courts, even though they say that the agent's liability rests in warranty and that the warranty obligation is contractual in character, are unwilling to abide the results of this classification without hedging. Take, for example, New York. There the liability has been said to rest in contract, but with the amplification that it is a contract implied in law and, further, that there is in fact no promise or warranty made by the agent at all, the only undertaking being one implied by law, regardless of intent,

¹²⁶ *Sorenson v. Kribs*, 82 Ore. 130, 161 Pac. 405 (1916); *Anderson v. Adams*, 43 Ore. 621, 74 Pac. 215 (1903); *Cochran v. Baker*, 34 Ore. 555, 52 Pac. 520, 56 Pac. 641 (1899). One of the most elaborate statements of this position is that in *Anderson v. Adams*, *supra* at 626, where it is said, "Though the agent who has exceeded his authority cannot be sued on the contract itself as a party thereto unless it contains apt words to charge him, an action may be maintained against him on his implied promise that he had authority to bind the principal. This promise is not a part of the agreement supposed to have been entered into with the principal, but independent thereof, and tantamount to an implied warranty that, if a third party will enter into a contract with the agent on behalf of his principal, he will indemnify such party against any loss that he may sustain, if it shall be ascertained that he does not possess the measure of authority which he assumes. Such warranty being impliedly given, it cannot be said that, in enforcing it, the court makes a new contract for the agent and a third party. We . . . think no error was committed in construing the complaint as an action *ex contractu* on the implied warranty".

as a device by which the loss may be imposed on the agent,¹²⁸ with full reservation of power to the courts to shape its terms as they think proper.¹²⁹ A strange sort of contract, this, whose existence is wholly independent of the intention of the parties and whose whole content is moulded by general rules of law, and one which surely conforms much more to the traditional notion of a tort than to that of a contract. Less ingenious and refined, but also less strained, is the approach of such a warranty state as Connecticut, where it has nevertheless been said that the agent's liability is for tortious conduct, flowing not from the obligation of any contract but from the wrong and resting on that latter foundation solely.¹³⁰ This comes almost indistinguishably close to the doctrine in Massachusetts, a tort state, but one where the action has been said not to be for deceit but in the nature of false warranty.¹³¹ The question reduces itself to whether there is here a warranty based on tort or a tort based on warranty, a dispute in which there is hardly room for passionate convictions or radically different conclusions as to logic or policy. Something of the same thought is latent in opinions which, pretermittting decision as to whether the proceeding is in tort or contract, attribute the agent's

¹²⁷ This, of course, does not apply to a state like Illinois, where, although actions on the implied warranty have been characterized as *ex contractu*, see *Seeberger v. McCormick*, 178 Ill. 404, 418, 53 N. E. 340 (1899), and objections to assumpsit as a remedy disallowed, the general position seems to be that, with possible obscure exceptions, suit against the agent may be brought optionally and interchangeably for breach of warranty or in case for misrepresentation, see *supra* note 112. That the warranty is deemed contractual instead of delictual is of little moment if, in any event, a tort action may be brought on the same state of facts at the election of the person who relied on the assumption of authority.

¹²⁸ *Moore v. Maddock*, 251 N. Y. 420, 167 N. E. 572 (1929).

¹²⁹ *Id.* at 426, 427 ("The purpose for which the device of an implied promise has been created must dictate the terms of the promise when the courts are called upon to formulate it . . . We do not from (cited) decisions seek to formulate the promise which in all cases the courts of this State should hold is implied in law from the assertion of authority to bind a principal where such authority is, in fact, lacking. The doctrine of an implied warranty is based upon a fiction, and there is need of caution in determining the final consequences of a fiction. Much might be said both in favor of and against the various possible views of the nature of the warranty implied in law. These cases are of importance because they show a tendency in the courts to extend the implied promise till it gives protection against all damages which naturally flow from continued reliance upon the agent's assertion of authority. At present we give them no further effect").

¹³⁰ *Jacobs v. Williams*, 85 Conn. 215, 221, 82 Atl. 202 (1912); *cf.* *Craft Refrigerating Machine Co. v. Quinipiac Brewing Co.*, 63 Conn. 551, 563, 29 Atl. 76 (1893) (dictum).

¹³¹ *May v. Western Union Tel. Co.*, 112 Mass. 90, 95 (1873); *cf.* *Boston & Albany R. R. v. Richardson*, 135 Mass. 473, 475 (1883).

liability in either event to his "wrongful conduct".¹³² In more accurate, elaborate statement,¹³³ the crux of the matter is presented as being the question of liability for representations of authority which are not in fact true but which induce the intended reliance. To this, no doubt, all the non-contract courts would agree.

What shall be said then of the nature of the agent's liability for assuming unpossessed authority, as revealed by this scrutiny of the American cases? The notion of holding him as a substituted party to the transaction which he ineffectually tried to make binding on his principal, while not wholly dead, is clearly moribund. Beyond this, courts have for the most part been cagey. Most decisions have phrased their statements as to the nature of the liability either indefinitely or in the alternative. Of those which have elected between tort and warranty, somewhat the greater number have preferred the latter. Yet the election has been largely academic since, with only the rarest exceptions, they have been reluctant to classify the resulting warranty obligation as consensual in nature.

Thus, one need not quarrel with the propositions of the Restatement, except to regret that they have uneconomically been led into framing two sections to do the work which either one alone was capable of doing. Quibbles over whether the liability is in warranty or tort are pointless if the umbilical cord uniting this warranty to its parent tort of undifferentiated misrepresentation is

¹³² See *Tedder v. Riffin*, 65 Fla. 153, 157, 61 So. 244 (1913) ("In an action on an implied warranty of authority to act as agent, in making a contract, the action is not on the contract purported to have been authorized, but it is on the unauthorized conduct of the supposed agent who acted under claim of authority . . . Whether it be *ex contractu* or *ex delicto*, the gist of the action is the misrepresentation made by the defendant to the plaintiff's pecuniary injury"); *Christensen v. Neilsen*, 73 Utah 603, 608, 276 Pac. 645 (1929); cf. *Hall v. Crandall*, 29 Cal. 567, 571 (1866); *Western Cement Co. v. Jones*, 8 Mo. App. 373, 376 (1880); *Hall v. Lauderdale*, 46 N. Y. 70, 75 (1871). Even in a jurisdiction where liability is on the contract by virtue of express statutory provision, it has been held that "the reason of the rule that an agent who exceeds his authority is personally bound, is that he misleads the party with whom he contracts, and is therefore held on the ground of misrepresentation", *Barry v. Pike*, 21 La. Ann. 221, 223 (1869).

¹³³ *Sullivan v. Mancini*, 103 Conn. 110, 113, 114, 130 Atl. 79 (1925) ("It is perhaps unnecessary to call the implied warranty of authority a legal fiction, for one who holds himself out as agent or broker in a given transaction necessarily represents that he is authorized to act in the particular transaction as such agent or broker, and invites the other party to act on that representation. . . . This puts the warranty, express or implied, upon the basis of a representation by word or conduct, made for the purpose of influencing the conduct of another, which, being relied on and acted on to the injury of the other, cannot be denied for the purpose of escaping liability for such injury"); accord *Williams v. DeSoto Oil Co.*, 213 Fed. 194, 197 (C. C. A. 8th, 1914).

not yet severed. And that it is so would seem to be the lesson resulting from this appraisal of what the American decisions have had to say. If, indeed, practical differences with respect to the incidents of suit or the elements of the cause of action flow from adoption of the one theory or the other, that is something else again. Our inquiry as to that must be postponed to the sequel.